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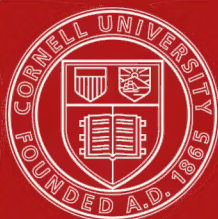
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A TREATISE
ON THE LAW OF
CORPORATIONS
HAVING A
CAPITAL STOCK

BY
WILLIAM W. COOK
OF THE NEW YORK BAR

FOURTH EDITION

VOL. I

CHICAGO
CALLAGHAN AND COMPANY
1898

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TO
THE HONORABLE
THOMAS M. COOLEY, LL.D.,
PROFESSOR, AUTHOR, AND JUDGE,
WHOSE
ABILITY, RESEARCH, LEARNING, AND CHARACTER
SECURED FOR HIM
AN IMPERISHABLE FAME AS A JURIST,
THIS WORK
IS RESPECTFULLY DEDICATED.

PREFACE TO FOURTH EDITION.

The title of this work has been changed to a "Treatise on Corporation Law," for the reason that the work itself has been expanded from a "Treatise on Stock and Stockholders" so as to cover every phase of corporation law.

The author has personally examined every decision on corporation law rendered, since the last edition of this work, by the higher courts of the different states, also by the Supreme and Circuit Courts of the United States, and by the higher courts of England and Canada. All of these decisions are referred to in this edition, inasmuch as every lawyer wishes references to the decisions of his own state. The author has also caused nearly all the citations to be verified,—a vast work, inasmuch as there are over thirty-eight thousand, involving over nineteen thousand different cases.

The five years which have elapsed since the third edition of this work have been prolific in the production of corporation law. Nearly a quarter of the railway mileage of the country has passed through the courts during those years, and the decisions on corporation law probably equal those of any ten prior years. Watered stock, broken pledges, insolvent preferences, illegal bonds, doubtful mortgages, foreclosures, receiverships, and reorganizations have been the order of the day. Corporation ruin has created corporation law. New and intricate questions of law have arisen and been adjudicated, and out of the confusion and wreck has come a vast mass of decisions elaborating, enlarging, and enriching corporation law. These decisions have been analyzed and included in this edition.

In England it is different. There a railroad mortgage can never be foreclosed. The mortgage is on the income and not on the property. When insolvency comes, no foreclosure is

allowed and no receiver's certificates are issued, but the stockholders, debenture-holders, and creditors must agree by a specific vote (generally two-thirds) on a plan of reorganization, and then, if the court says that such plan is fair, the minority are bound. In America, on the other hand, when a railroad becomes insolvent litigation begins, receiver's certificates are issued, and then comes a plan of reorganization which gathers up the remains of the property. The powerful majority dictate the plan; the weak are at the mercy of the strong; and in the process millions pass to reorganizers by way of profit.

Another fruitful source of American corporation law has been the "Trust." The original "Trust" form of organization has disappeared, but the "Trusts" themselves have reappeared in the form of huge corporations. Many states of the Union have enacted statutes against these new corporations, but such statutes signally fail of their purpose. New York state, impelled by its vigorous central New York constituency,—a constituency still true to its New England origin and ideal of preserving this country as the land of opportunity, of self-made men, of freedom from class distinctions and the power of wealth,—is still carrying on the struggle, but without avail. The laws of trade are stronger than the laws of men. Thus, although the Supreme Court of the United States has recently held that Railroad Pools are prohibited by the anti-trust act of Congress, nevertheless the railroads continue to work in harmony. Meantime the economic effects of "Trusts" are becoming apparent,—a decrease in the cost of production, but a decrease also in the number of small producers, and a transformation of the latter into employees of colossal corporations.

New Jersey is still the favorite state for incorporations. The expenses of that state are paid largely from corporation fees, and the relation of the state toward the corporations resembles that between a feudal baron and the burghers of old, who paid for protection. Some recent New Jersey decisions, however, invalidating stock and bonds issued for property taken at an overvaluation,—decisions contrary to the common law as laid down by the New York, federal, and English courts,—will dampen the ardor of those who would incorporate in the state of New Jersey. West Virginia retains its liberal laws,

but the cheapness of West Virginia charters seems to detract from their desirability. New York has largely removed the old statutory liability of directors, but still holds the stockholders liable where "watered" stock has been issued. Illinois has checked the formation of corporations by imposing a heavy incorporation fee. Connecticut and Maine, both favorite resorts for shadowy incorporations in former days, have gradually lost the business, the former on account of its laws requiring twenty per cent of the capital stock to be paid in cash, and requiring a majority of the directors to be citizens of the state; the latter on account of a decision of its Supreme Court holding stockholders personally liable on "watered" stock.

Watered stock still claims the attention of legislatures and constitutional conventions. The new states continue to copy the constitutional prohibitions of the older states, although these prohibitions were long ago construed away by the courts, and properly so, because their enforcement punished the innocent and unsettled hundreds of millions of dollars of investments. On the other hand, Massachusetts alone of all the states, by a process peculiarly her own, has worked out a successful remedy for watered stock by forbidding the issue of any stock or bonds for property until after State Commissioners have passed upon the proposed issue. That state does not wait until the stock and bonds have been issued and sold to the public by the promoters. The result is that there are few receiverships in the Commonwealth of Massachusetts.

The statutory liability of stockholders in Kansas corporations has been a prolific source of litigation, owing to the innate tendency of Kansas corporations to become insolvent. The New York Court of Appeals has emphatically refused to enforce this liability. Other states have done the same. The logic and law of these decisions may well be doubted, but the futility of a statutory liability of stockholders has again been demonstrated by the fruitless attempts to enforce this Kansas liability.

The doctrine of *ultra vires* is disappearing. The old theory that a corporate act beyond the express and implied corporate powers was illegal and not enforceable, no matter whether any actual injury had been done or not, has given way to the

practical view that the parties to a contract which has been partially or wholly executed will not be allowed to say it was *ultra vires* of the corporation. The New York Court of Appeals leads the way, and has declared that, where neither the stockholders nor corporate creditors are injured, the court will not declare a contract void merely to satisfy a superannuated principle of law. Indeed, in the Bath Gas Light Company case, in 1896, the New York court went to the extent of breaking away entirely from the decisions of the Supreme Court of the United States and of the English courts on this subject, and applied to a contract of a quasi-public corporation the same rule that years ago was applied by that court to watered stock and accommodation paper. This rule is just and will prevail. In still another case the New York Court of Appeals expressed its opinion plainly when it said that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."

A curious phase of corporation law recently arose in England, where the lower courts held that where a merchant incorporates a company to take over and carry on his business—a "one-man company," the other stockholders being "dummies"—and such company becomes insolvent, he is liable for its debts on the grounds that it was but his agent and that such a corporation was not contemplated by the law. The House of Lords, however, reversed these decisions and held that no public policy or fair construction of the common and statutory law called for any such conclusion.

On the other hand there is a growing inclination on the part of the courts to occasionally ignore the existence of the corporation, and, where substantial justice requires it, to hold that the stockholders are the corporation, and the corporation the stockholders. The New York Court of Appeals, in the Anthony Case, expressed this power of the court when it said: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth."

On other subjects, also, the record of the past five years is interesting. The decisions of the Circuit Courts of the United States continue to be the most prolific source of corporation

law. On the other hand, the decisions of the Supreme Court of the United States, since the limitation of appeals to that court, are no longer so numerous in that class of cases. At present it is only occasionally that a decision from that great tribunal lights up obscure, difficult, or new features of corporation law. The English decisions, on the contrary, though no larger in volume than the decisions of a single American state, continue to be of the first importance, because they treat of the most advanced questions of corporation law. This is due to the fact that the modes of financing and organizing in London—the moneyed center and clearing-house of the world—are developed, elaborated, and refined far in advance of those in New York, the financial center of America. Nevertheless, the New York Court of Appeals continues its rich contributions to the law of corporations. The commercial supremacy of New York brings before that court all the ingenious financial devices of the American mind, and the New York Court of Appeals, with broad and impartial judgment, still separates the valuable from the worthless, the honest from the fraudulent, the progressive from the speculative.

The onward march of socialism in its attacks on property has been met by the Supreme Court of the United States. The court that stopped the repudiation of municipal bonds twenty years ago has now rebuked and stopped the confiscation of corporate property and the violation by municipalities of their grants to corporations. In the *Reagan Case* of 1894, and the *Burlington & Quincy Railroad Case* of 1898, the Supreme Court practically overruled its decisions in the *Granger Cases* of 1876, and now holds that legislative reductions of railroad rates may be investigated by the courts, and if found to be unreasonable may be declared void. Again, in the *Monongahela Canal Case*, the Supreme Court held that where the property of a quasi-public corporation is taken by the government for public use, the franchise, the good-will,—in other words, the *earning power*,—must be paid for as well as the physical property itself. And in still another case the Circuit Court of the United States, in declaring void the repudiation by a municipality of its grant to a street railway, said that the frequency of such attempted repudiations furnish a “suggestive lesson as to the freedom with which municipal legislatures in this country have

undertaken to strike down enterprises which they were anxious to encourage in the first instance with liberal grants and large declarations of good faith."

These decisions are bulwarks of public honor, public honesty, and private property. They are the American way of dealing with the revolutionary doctrines of socialism. In England the House of Lords is the conservative power of the nation; in Germany the Crown; in France the fear of the Commune. But in America the Federal Constitution, written by lawyers, expounded by lawyers, and applied by lawyers, is the final protection. And the profound changes which are likely to take place in America during the next twenty years, in regard to the ownership of quasi-public property, and in regard to taxation of property generally, will be moulded by the legal profession. Corporations will pass through many perils, but the changes, owing to the flexible nature of American institutions, will be made peaceably and gradually, in accord with the movement of intelligent public sentiment; and they will be made by the courts and the lawyers—the real law-makers of the land. Corporation law will change, but corporation property and rights, like all other private property and rights, will be protected, and, in the reconstruction which may be at hand, the ninety thousand American lawyers will formulate and express the will of seventy-five millions of American people.

WILLIAM W. COOK.

NEW YORK, *October 1, 1898.*

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THE LAW OF CORPORATIONS

HAVING A

CAPITAL STOCK.

PART I.

ISSUE OF AND LIABILITY ON STOCK.

CHAPTER I.

DEFINITIONS AND NATURE OF CORPORATIONS.

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| <p>§ 1. Definition of corporation.</p> <p>2. Definition of charters, general and special.</p> <p>2a. Acceptance of a charter by the corporation arises from merely acting under it, and a want of formal acceptance is no defense to actions on its contracts.</p> <p>3. A private corporation may become accommodation indorser, distribute its assets, issue its notes, stock, or bonds below par or for no consideration whatsoever, give away its assets, or may mortgage its property for the personal benefit of a part or all of its stockholders or officers; provided, always, that all the stockholders assent, and provided that corporate creditors are not injured, and provided that no statute forbids such acts. The doctrine of <i>ultra vires</i> is no longer held to forbid such acts by a private corporation under such circumstances — Definition of powers, express and implied, and of franchise.</p> | <p>§ 4. The certificate of incorporation under the general act cannot legally contain any powers, restrictions, or provisions except those called for by the statute.</p> <p>4a. By-laws of a corporation.</p> <p>5. Mistakes, irregularities, and illegalities in becoming incorporated.</p> <p>6. "Dummy" corporations — Fraudulent corporations — The court will sometimes ignore the corporate existence in order to do justice — Corporations as distinguished from partnerships.</p> <p>7. Classes of corporations and the class considered herein.</p> <p>8. Corporations having a capital stock — Definition of capital stock.</p> <p>9. Is the capital stock a trust fund for the benefit of corporate creditors?</p> <p>10. Definitions of corporator, subscriber, shareholder, stockholder, and officer.</p> <p>11. Relation of stockholders towards the corporation.</p> <p>12. Shares of stock defined — What law governs — Com-</p> |
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| <p>mon stock—Preferred stock.
Watered stock—Deferred stock—Overissued stock—Special stock.</p> <p>§ 13. Certificates of stock.</p> <p>14. Definition of bond, mortgage, deed of trust, debenture, articles of association, memoranda of association, scrip, certificate book, transfer</p> | <p>book, stock ledger, underwriting, founders' shares.</p> <p>§ 15. Name of a corporation.</p> <p>15a. Statutes which apply to "persons" are generally construed to apply to corporations.</p> <p>15b. Torts committed by corporations—Exemplary damages. Indictment.</p> |
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§ 1. *Definition of corporation.*—A corporation is an artificial person, like the state. It is a distinct existence—an existence separate from that of its stockholders and directors. Chief Justice Marshall, in the Dartmouth College Case,¹ defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."

¹ Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819).

The supreme court of the United States has said that "an incorporated company is an association of individuals, acting as a single person and by their corporate name;" and again, "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association." U. S. v. Trinidad Coal Co., 137 U. S. 160 (1890).

In *Re Gibbs' Estate*, 157 Pa. St. 59 (1893), a corporation is defined as follows: "A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property intrusted to it for a common purpose. As it is the creature of positive law, its rights, powers, and duties are prescribed by the law."

The following cases give definitions of a corporation: *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 295 (1860); *Ohio, etc. R. R. v. Wheeler*, 1 Black, 286, 295 (1861), per Taney, C. J.; *Tippecanoe County v. Lafayette*, etc. R. R., 50 Ind. 85, 108 (1875); *Railroad Com'rs v. Portland*, etc. R. R., 63 Me. 269, 277 (1872); *Thompson v. Waters*, 25

Mich. 214, 223 (1872); *Baltimore, etc. R. R. v. Fifth Baptist Church*, 108 U. S. 317, 330 (1883); *People v. Assessors of Watertown*, 1 Hill, 616, 620 (1841); *Thomas v. Dakin*, 22 Wend. 9, 70, 104 (1839); *Warner v. Beers*, 23 Wend. 103, 123, 124 (1840); *Head v. Providence Ins. Co.*, 2 Cranch, 127, 167 (1804); *Bank of U. S. v. Deveaux*, 5 Cranch, 61, 88 (1809), per Marshall, C. J.; *Louisville, etc. R. R. v. Letson*, 2 How. 497, 552 (1844); 2 Kent, Com. 268; *State v. Milwaukee*, etc. R'y, 45 Wis. 579, 592 (1878); 86 Fed. Rep. 585.

In *Tipling v. Pexall*, 2 Bulst. 233 (1613), "the opinion of Manwood, Chief Baron, was this, as touching corporations: that they are invisible, immortal, and that they had no soul. A corporation is a body aggregate; none can create souls but God; but the king creates them, and therefore they have no souls."

It is well to state here that a joint-stock corporation and a joint-stock association are essentially different. Both have a capital stock, and both are managed by boards of officers and meetings of the stockholders. But a joint-stock company is unincorporated, is not a distinct entity, and is but a partnership. See ch. XXIX, *infra*.

A corporation can be created by or under legislative enactment, and by that alone.¹

The domicile, residence, and citizenship of a corporation are in the state where it is incorporated.²

The Romans seem to have originated the idea of a corporation. The genius of that people for conquest and government led naturally, as with the English-speaking races, to industrial organization and new modes of business on a large scale. The Roman corporation was much the same as the corporation of modern times.³

§ 2. *Definition of charters, general and special.*—A charter is the instrument which creates the corporation. It formerly was granted by the king. Later it was granted by an act of the legislature—a separate act being passed for each charter. At present the constitutions of many of the states require that

¹ *Franklin Bridge Co. v. Wood*, 14 Ga. 80 (1853); *U. S. Trust Co. v. Brady*, 20 Barb. 119 (1855); *Pennsylvania R. R. v. Canal Com'rs*, 21 Pa. St. 9 (1852); *Stowe v. Flagg*, 72 Ill. 397 (1874); *Hoadley v. Essex County*, 105 Mass. 519 (1870); *State v. Bradford*, 32 Vt. 50 (1859); *McKim v. Odom*, 3 Bland, Ch. (Md.) 407, 417 (1829).

In England certain colleges have power to create corporations. No such power exists in this country. *Medical Inst. v. Patterson*, 1 Denio, 61 (1845).

Congress has constitutional power to incorporate a bank. *McCullough v. Maryland*, 4 Wheat. 316 (1819). Congress may incorporate interstate railroads. *California v. Pacific R. R.*, 127 U. S. 1, 39 (1888).

No particular form of words is requisite to create a corporation. *Denton v. Jackson*, 2 John. Ch. 320 (1817). Yet a statute which seems to create a corporation may be construed not to have that effect. See *Walsh v. New York, etc. Bridge*, 96 N. Y. 427 (1884), holding that the trustees of the Brooklyn bridge are not a corporation, but that the property belongs to the two cities of New

York and Brooklyn. A charter is legal, even though no maximum capital stock is fixed. *State v. Bank of Commerce*, 95 Tenn. 221 (1895).

² *American, etc. Co. v. Johnson*, 60 Fed. Rep. 503 (1893). The domicile of a corporation is entirely distinct from the personal domicile of its officers or stockholders. *Perry v. Round Lake, etc. Assoc.*, 22 Hun, 293 (1880); *Rossie Iron Works v. Westbrook*, 59 Hun, 345 (1891). See also cases in ch. XLV, *infra*, where the jurisdiction of the federal courts was at issue.

³ Professor Rudolph Sohm, in his *Institutes of Roman Law*, says, pp. 104–106: “In Roman law, the property of a corporation is the sole property of the collective whole; and the debts of a corporation are the sole debts of the collective whole. . . . It represents a kind of ideal private person, an independent subject capable of holding property, totally distinct from all previously existing persons, including its own members. It possesses, as such, rights and liabilities of its own. It leads its own life, as it were, quite unaffected by any change of members. It stands apart as a

in all possible cases the legislature shall pass general acts whereby, by the simple filing of a prescribed instrument, persons may form a corporation without applying to the legislature at all. These general acts specify the contents of the instrument to be filed, and specify also the powers of the corporation. A charter is special where a special act of the legislature creates the corporation. A charter is under the general act when it consists of a certificate of incorporation filed with the public authorities in accordance with a general act of the legislature allowing corporations to be formed in that manner. The general laws of the state apply to a corporation organized under a special act so far only as the former are consistent with the latter.¹ Although a special charter gives the right to

separate subject or proprietary capacity, and, in contemplation of law, as a stranger to its own members. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, its debts another's debts. . . . Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the collective whole as the ideal unity of the members bound together by the corporate constitution; in raising this whole to the rank of a person (a juristic person, namely), and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons."

¹ A provision of the general statutes imposing a personal liability upon directors of a corporation is not incorporated into a special charter by a clause declaring that that corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the general act. *Park Bank v. Remsen*, 158 U. S. 337 (1895). The

provisions of the general statutes relative to corporations are not applicable to a special charter so far as the provisions of the special charter seem to be inconsistent with those of the general statutes. See *State v. Bowen*, 30 Barb. 24 (1859); affirmed on other points, 21 N. Y. 517 (1860); also *Hollis v. Drew, etc. Seminary*, 95 N. Y. 166, 173 (1884); *Lefevre v. Lefevre*, 59 N. Y. 434 (1875); *Clarkson v. Hudson River R. R.*, 12 N. Y. 304 (1855); *Johnson v. Hudson River R. R.*, 49 N. Y. 455 (1872); *Burroughs v. Brinkerhoff*, 68 N. Y. 259 (1877).

A general statute reserving the power to amend or repeal charters is a part of all special charters passed subsequently. *Griffin v. Kentucky Ins. Co.*, 3 Bush (Ky.), 592 (1868); approved in *Louisville Water Co. v. Clark*, 143 U. S. 1 (1892).

The charter of a company formed under the general law consists not only of its articles of association, but also of the general statutes of the state under which the organization takes place. *People v. Chicago Gas T. Co.*, 130 Ill. 268 (1889).

The duration of a corporation is twenty years, although its special charter provides for "perpetual succession," where a general act pro-

a railroad corporation to consolidate with other roads, yet a subsequent general statute may take away this power except so far as the same has been already exercised.¹ A special charter existing at the time of a constitutional amendment prohibiting future special charters may nevertheless be amended thereafter.²

vides for twenty years' duration. *State v. Payne*, 129 Mo. 468 (1895).

A corporation whose charter is not expressly limited as to duration is perpetual. *Snell v. Chicago*, 133 Ill. 413 (1890).

"Corporations organized under the general law are vested with the powers conferred by the general act, and those contemplated by the certificate, and such incidental powers with respect to the general and special powers as are necessary, in the sense of convenient, reasonable, and proper." *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891).

In New York the legislature is to decide whether a special or general incorporation law shall be enacted. *People v. Bowen*, 21 N. Y. 517 (1860); *Re Gilbert El. R'y*, 70 N. Y. 361 (1877).

A charter cannot be sold, mortgaged, or assigned, although the property and power to operate the property may be. See § 790, *infra*.

In *Citizens' Bank v. Parish of Orleans*, 54 Fed. Rep. 73 (1893), the court held that the acceptance by the corporation of an act which compelled the corporation to accept the terms of a new constitution did not have that effect.

In *Citizens' St. R. R. v. Memphis*, 53 Fed. Rep. 715 (1893), the court held that a charter granted without the reserved right to amend or repeal did not become subject to the right to amend or repeal, although it had entered into a consolidation after a constitutional provision was passed reserving this right in all cases. The consolidation was held not to have dissolved the old corporation.

¹*Pearsall v. Great Northern R'y*,

161 U. S. 646 (1896). Mr. Justice Brown's opinion in this case contains a clear exposition of the law on this subject and on the various and far-reaching applications and restrictions of the Dartmouth College case.

The general statutes are a part of the charter, and a subsequent repeal of a part of the general statutes does not affect the corporation unless the statute expressly so provides. *Knights of Pythias v. Weller*, 93 Va. 605 (1896).

²*Wallace v. Loomis*, 97 U. S. 146 (1877).

A constitutional provision against special charters does not prevent the legislature curing defects in the organization of a corporation under a general act. *State v. Webb*, 110 Ala. 214 (1896).

Where by an amendment an insurance charter is changed into a banking charter, an exemption from taxation may be lost thereby by reason of a constitutional provision enacted after the original charter was granted, but before the amendment was granted. *Memphis City Bank v. Tennessee*, 161 U. S. 186 (1896).

Although a constitutional provision requires incorporations under general acts, if at all, yet an old charter existing prior to the constitutional provision may be amended by the legislature after such constitutional provision. *Farnsworth v. Lime Rock R. R.*, 83 Me. 440 (1891).

An old special charter may be amended although a new constitution forbids the grant of special charters. *St. Joseph, etc. R. R. v. Shambaugh*, 106 Mo. 557 (1891).

The state creates the corporation upon the application of individuals, who are called incorporators. The incorporators then organize the corporation. The functions of the incorporators thereupon cease, and stockholders proceed to contribute the capital and elect directors. The directors then start and continue to keep in operation the powers of the corporation.

§ 2a. *Acceptance of a charter by the corporation arises from merely acting under it, and a want of formal acceptance is no defense to actions on its contracts.*—It is an old principle of law that individuals cannot be compelled by the state to accept a charter to act as a private corporation. Accordingly an acceptance of the charter by them is necessary to the actual existence of the corporation. But there is no rigid rule of law requiring them to indicate such acceptance in a formal manner. Any acts which prove an intent on the part of the corporators to proceed under the charter is a sufficient acceptance of it. It has been frequently held that an acceptance may be shown by proof that corporate meetings and elections have been held and other corporate acts entered into. Mere user of the right to act as a corporation is sufficient.¹

¹ Acceptance of a charter is sufficiently shown by user under it. *Demarest v. Flack*, 128 N. Y. 205 (1891); *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102 (1840); *Bank of Manchester v. Allen*, 11 Vt. 302 (1839); *Talladega Ins. Co. v. Landers*, 43 Ala. 115, 136 (1869); *Blandford School Dist. v. Gibbs*, 56 Mass. 39 (1848); *Gleaves v. Brick Church Turnp. Co.*, 1 Sneed (Tenn.), 491 (1853); *Perkins v. Sanders*, 56 Miss. 733 (1879); *Mutual F. Ins. Co. v. Stokes*, 9 Phila. 80 (1872); *Penobscot Boom Corp. v. Lamson*, 16 Me. 224 (1839); *Sampson v. Bowdoinham, etc. Corp.*, 36 Me. 78 (1853); *Lincoln, etc. Bank v. Richardson*, 1 Me. 79 (1820); *Bow v. Allentown*, 34 N. H. 351, 372 (1857); *Jameson v. People*, 16 Ill. 257 (1855); *Covington v. Covington, etc. Co.*, 10 Bush (Ky.), 69 (1873); *People v. Farnham*, 35 Ill. 562 (1864); *Middlesex Husbandmen, etc. v. Davis*, 44 Mass. 133 (1841); *Commonwealth v. Bakeman*, 105 Mass. 53 (1870); *Pal-*

frey v. Paulding, 7 La. Ann. 363 (1852); *Benbow v. Cook*, 115 N. C. 324 (1894); *Trott v. Warren*, 11 Me. 227 (1834). As to the acceptance of a charter, see also the digest of cases in 12 Am. R. R. & Corp. Rep., pp. 460-466. Building a part of the road is an acceptance of a special charter. *St. Joseph, etc. R. R. v. Shambaugh*, 106 Mo. 557 (1891). Acceptance is sufficient where the grantees afterwards apply for an amendment to the charter. *Farnsworth v. Lime Rock R. R.*, 83 Me. 440 (1891); and see cases in §§ 183-186, *infra*, holding that a subscriber cannot defeat an action to collect his subscription by alleging informalities in organization. Formerly it was customary at the first meeting of the corporation to pass a formal vote accepting the charter. This, however, is not necessary. The fact of holding the meeting is a sufficient acceptance. See same cases; also, *Atlanta v. Gate*

§ 3. *A private corporation may become accommodation indorser, distribute its assets, issue its notes, stock, or bonds below par or for no consideration whatsoever, give away its assets, or may mortgage its property for the personal benefit of a part*

City Gas Light Co., 71 Ga. 106 (1883), where a charter granted in 1868 was not acted on until 1877. It was held that the application for a charter constituted an acceptance in advance. *McKay v. Beard*, 20 S. C. 156 (1883), holding that an acceptance existed though no meeting at all for organization was held, but the corporation proceeded to business; *Logan v. McAllister*, 2 Del. Ch. 176 (1858), holding that irregularities in organization are immaterial; *Russell v. McLellan*, 31 Mass. 63 (1833), where no notice was given of the first meeting, and a stockholder sued for a dissolution of the company as a copartnership. The best evidence possible of the acceptance should be given. *Hudson v. Carman*, 41 Me. 84 (1856). Where subscription books are opened and then abandoned, and ten years later are secretly re-opened and subscriptions taken without giving the statutory notice to the public that they may subscribe, the charter is forfeitable. *State v. Bull*, 16 Conn. 179 (1844). So, also, where a new charter is granted to an existing corporation, and it continues to act, the jury are to say whether the corporation continued under the old charter or accepted the new one. *Hammond v. Straus*, 53 Md. 1 (1879). As regards the acceptance of a charter amendment by simply acting under it, see *State v. Sibley*, 25 Minn. 387 (1879); *Sumrall v. Sun Mut. Ins. Co.*, 40 Mo. 27 (1867); *Rex v. Hughes*, 7 B. & C. 708 (1828), a municipal corporation case; *Bangor, etc. R. R. v. Smith*, 47 Me. 34 (1859); *Lyons v. Orange, etc. R. R.*, 32 Md. 18 (1869); *Wetumpka, etc. R. R. v. Bingham*, 5 Ala. (N. S.) 657 (1843), and many cases in ch. XXVIII and § 503, *infra*.

Failure to organize under a special charter until after a constitutional amendment prohibiting special charters is fatal to it. *State v. Dawson*, 16 Ind. 40 (1861). In Texas it is a sufficient acceptance of a special charter to organize under it, but if the organization does not take place until after the constitution is changed, the special charter is subject to the amended constitution. *Quinlan v. Houston, etc. R'y*, 89 Tex. 356 (1896). Acceptance must be *in toto* or not at all. *Rex v. Westwood*, 4 B. & C. 781 (1825). A person cannot be compelled to act as a corporation in a private corporation. *Ellis v. Marshall*, 2 Mass. 269 (1807). Hence his acceptance must be proved by user at least. *Coffin v. Collins*, 17 Me. 440 (1840). Organizing out of the state may not be legal, yet it suffices for an acceptance of the charter. *Heath v. Silverthorn, etc. Co.*, 39 Wis. 146 (1875). A special charter must be accepted before the corporation exists, and such acceptance cannot be at a meeting held out of the state. Hence a bill by a stockholder to set aside a forfeiture of his stock was dismissed by the court. *Smith v. Silver Valley Min. Co.*, 64 Md. 85 (1885). Acceptance of a new charter is not necessarily an abandonment of the old one. *Johnston v. Crawley*, 25 Ga. 316 (1858); *Woodfork v. Union Bank*, 3 Coldw. (Tenn.) 488 (1866). A corporation cannot accept part of a special charter and reject the rest. *Re Metropolitan Transit Co.*, 111 N. Y. 588 (1889). Acceptance of the charter is not implied by accepting the benefits, but performing none of the burdens imposed, as where a toll road was established over a highway. *Welsh v.*

or all of its stockholders or officers, provided always that all the stockholders assent, and provided that corporate creditors are not injured, and provided that no statute forbids such acts. The doctrine of ultra vires is no longer held to forbid such acts by a private corporation under such circumstances — Definition of powers, express and implied, and of franchise.—The powers of the corporation are given by the charter, and these powers are express or implied.

The express powers are those which are expressly specified in the charter or the statutes under which the corporation was incorporated.

The implied powers of a corporation are those which naturally arise from the nature of the business. Thus, a corporation has implied power to buy, hold, and sell necessary real estate and other property in its corporate name; to sue and be sued in that name; to do business in its corporate name without rendering its stockholders liable as partners for its debts; to govern its officers, agents, and business by by-laws; to issue transferable certificates of stock to its stockholders; to have its business managed by directors instead of by the stockholders as in a partnership; to continue business although its stockholders die or sell their stock; to borrow money and give bills, notes, and acceptances; to issue negotiable bonds; to assign for the benefit of creditors; and, except in quasi-public corporations, such as railroads, to give a mortgage.¹

Plumas County, 94 Cal. 368 (1892). Where a stock corporation has received no stock subscription and issued no stock, it cannot maintain a suit. *Aspen, etc. Co. v. Aspen*, 5 Colo. App. 12 (1894).

¹The definition of a corporation throws some light upon its nature, but a still clearer idea is obtained by considering the inherent powers of corporations. 1 Blackstone's Com. 475, says that the inseparable incidents or powers of all corporations aggregate are: (1) To have perpetual succession; (2) to sue or be sued, and grant or receive by the corporate name; (3) to purchase and hold lands

and chattels; (4) to have a common seal; (5) to make by-laws. Chancellor Kent, in 2 Com. 278, n., adds: (6) the power to expel members. 1 Kyd, Corp. 13, 69, 70, has a different summary of incidents. See also 2 Kent, Com. 277.

The greatest and most vital features of modern corporations, however,—features that have become prominent since those authors wrote, and the features that have rendered possible the universal use and great achievements of corporations,—are two in number: (1) The limited liability conferred, by implication, by the granting of a charter;

The theory of a corporation is that it has no powers except those expressly given or necessarily implied. But this theory is no longer strictly applied to private corporations. A private corporation may exercise many extraordinary powers, provided all of its stockholders assent and none of its creditors are injured. There is no one to complain except the state, and, the business being entirely private, the state does not interfere. Thus, fifty years ago the courts would summarily have declared it illegal for a business corporation to become an accommodation indorser of commercial paper. But to-day there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper, provided such indorsement is made with the knowledge and assent of all the directors and stockholders, and provided corporate creditors are paid.¹

Unless some statute prohibits, or a stockholder or creditor objects, a corporation may declare a dividend out of its capital stock.²

A corporation may execute its note for the personal indebtedness of its sole stockholder, and no one but the creditors of the corporation can complain.³ A mortgage given by the corporation for the personal benefit of a part or all of the stock-

(2) the right of the corporation to issue shares of stock and the right of the members to transfer them.

It has been said that the essence of a corporation consists of a capacity (1) to have perpetual succession under a special name and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued, by its corporate name as an individual; and (3) to receive and enjoy in common grants of privileges and immunities. *Thomas v. Dakin*, 22 Wend. 1, 71 (1839). The supreme court of Illinois, speaking of the above, says: "The first two describe the franchises which belong to the incorporators; the last those which belong to the corporation." *Snell v. Chicago*, 133 Ill. 413 (1890).

¹ *Martin v. Niagara Falls, etc. Co.*, 122 N. Y. 165 (1890). See also § 774, *infra*.

² *People v. Barker*, 141 N. Y. 251 (1894). See also §§ 535, 546, 548, 671, *infra*. Where a few persons own all the stock of a company and use the profits for personal expenses and miscellaneous purposes, irrespective of the corporation, all the stockholders knowing thereof and assenting thereto, a policy of insurance belonging to one of them is his, even though the premiums were paid out of the corporate profits, it being shown that all this was done while the corporation was solvent, and that no rights of creditors then intervened, and that all the debts represented by the receiver arose subsequently. *Little v. Garabrant*, 90 Hun, 404 (1895); *aff'd*, 153 N. Y. 661 (1897). On a sale of all its assets, a corporation may distribute the proceeds. See § 671, *infra*.

³ *Millsaps v. Merchants', etc. Bank*, 71 Miss. 361 (1893).

holders is legal, if all the stockholders assent.¹ Bonds of a corporation may be issued at any price which may be agreed upon,² and stock may be issued at less than par or even given away, provided all the stockholders assent,³ or do not object within a reasonable time,⁴ and provided corporate creditors are not injured.⁵ And even as to the latter, only those corporate creditors can object who become such after the watered stock was issued.⁶

A corporation may sell all its property and distribute the proceeds among its stockholders, if all its stockholders assent,⁷ or may sell the corporate property and take in payment purchase-money mortgage bonds to be distributed among the stockholders.⁸

A bond dividend is legal⁹ as well as a stock dividend.¹⁰ The

¹Swift v. Smith, 65 Md. 428 (1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." Again, where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. v. Schneider, 110 Mo. 83 (1892). An improvement corporation may legally

give a mortgage to secure the personal debt of its president, if none of the stockholders or the existing creditors object. Osborn v. Montelac Park, 89 Hun, 167 (1895); aff'd, 153 N. Y. 672. In Germania, etc. Co. v. Boynton, 71 Fed. Rep. 797 (1896), however, it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them.

²See § 766, *infra*.

³§§ 38, 39, *infra*. Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. v. Farmers', etc. Co., 13 Colo. 587 (1889).

⁴See ch. XLIV, *infra*.

⁵§§ 42, 43, *infra*.

⁶§ 42, *infra*.

⁷See §§ 670, 671, *infra*.

⁸United Lines Tel. Co. v. Boston, etc. Co., 147 U. S. 431 (1893). See also § 766, *infra*.

⁹Wood v. Lary, 124 N. Y. 83 (1891).

¹⁰See § 536, *infra*.

corporation may also, by consent of all, give away corporate assets,¹ and in a great variety of ways by which directors and corporate officers make a personal profit out of the corporation, a profit, which is fraudulent and illegal if any stockholder objects,² is legal and is upheld by the courts if all the stockholders assent³ or do not object.⁴

In other words, the question is, who has been damaged? The state is not damaged and cannot enjoin the act;⁵ neither can a stockholder who assents or delays after knowledge of the act;⁶ nor can the purchaser or transferee of stock which assented to the act;⁷ nor can a corporate creditor who is sure to be paid, or whose debt is not due, or who has not yet recovered judgment;⁸ nor can the corporation itself.⁹ If no one is injured no one can complain. If there is no damage there can be no suit. The theoretical idea that the act is *ultra vires* or that the corporation has exceeded its powers or has violated some shadowy principle of public policy is being rapidly abandoned, and the courts are basing their decisions on the logical principle of damage suffered or threatened.

The old theory of a corporation was that it could not legally do anything in excess of its express and implied powers. But the modern view is that a private corporation may, if all its stockholders assent and if creditors are paid. Public policy does not require business corporations to confine themselves strictly within the limits of the words of their charter.¹⁰

¹ See § 681, *infra*.

² See §§ 647-663, *infra*, for illustrations. Thus, where the directors own all the stock of a corporation, the usual rules preventing a director from contracting with the corporation do not apply. *McCracken v. Robison*, 57 Fed. Rep. 375 (1893).

³ See §§ 647-663, *infra*.

⁴ See ch. XLIV, *infra*.

⁵ See §§ 37, 623, 635, *infra*.

⁶ See § 39 and ch. XLIV, *infra*.

⁷ See §§ 40, 730, *infra*.

⁸ See §§ 735, 863, *infra*.

⁹ §§ 38, 662, *infra*. As to public corporations,—as, for instance, a railroad,—the rule, of course, is different. See §§ 892-894, *infra*.

¹⁰ The New York court of appeals said in *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 186 (1879): "A bank has no authority from the state to engage in benevolent enterprises; and a subscription, though formally made, for a charitable object would be out of its powers; but it would not be otherwise an illegal act; yet if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires*, no wrong would be done, no public interest harmed; and no stockholder could object, or claim that there was an infringement of his rights, and have redress or protection. Such an

In the case of railroad corporations public policy does intervene and does limit the implied powers. A railroad company has no *implied* power to sell, lease, or mortgage its road, or to charge such rates for service as it sees fit, or to charge one man more than another for the same service.¹ Yet even here the old doctrine is breaking down. The New York court of appeals has recently drawn the line between its decisions and the decisions of the supreme court of the United States, and has held that where a contract of a corporation is not immoral, and is not expressly prohibited by its charter, and has been performed by one of the parties thereto, the court will compel the other party to do substantial justice.²

It is a general rule that "every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws.³ For this reason it is held that the words "franchises, rights, and privileges" do not necessarily include an exemption from taxation.⁴ On the other hand, a corporation chartered to exist

act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust for stockholders is not of a public nature." See also § 774, *infra*.

¹ See ch. LIII, *infra*.

² *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 29-31, 33, 34, 37 (1896), where the court said: "The courts in this state from an early day, commencing as far back as the Utica insurance cases, have sought to regulate and restrict the defense of *ultra vires* so as to make it consistent with the obligations of justice." See also *Augusta, etc. R. R. v. City Council*, 28 S. E. Rep. 126 (Ga., 1897). The old rule of *ultra vires* has been changed so that now only the state or a party interested in the corporation can complain. *Farwell Co. v. Wolf*, 70 N. W. Rep. 289 (Wis., 1897).

³ *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 49 (1891).

⁴ *Phoenix, etc. Co. v. Tennessee*, 161 U. S. 174 (1896). In *State v. Pittsburgh, etc. R. R.*, 50 Ohio St. 239 (1893), a franchise is said to be, "as defined by Kent, a particular privilege conferred by the grant of the government and vested in individuals, or, as defined by Blackstone, a branch of the king's prerogative subsisting in the hands of a subject. 3 Kent, Com. 458; 2 Bl. Com. 37."

A corporate franchise may mean either the power to act as a corporation, or may mean the right which a corporation has to operate a franchise, such as a railroad's right of way. The former is not property. It is not an element of value in estimating the value of the majority of the stock. *Johnson v. Kirby*, 65 Cal. 482 (1884). It is not an asset. A bank franchise does not pass to its assignee for the benefit of creditors, and the court will deny his applica-

only a limited number of years may take the fee to real estate,¹ accept a street franchise for a longer period than its own charter exists,² and enter into a contract which cannot be fully performed during the corporate existence.³ A corporation as well as an individual may waive the objection that a statute is unconstitutional.⁴ The word "franchise" has been construed to mean the entire property, tangible and intangible, when so intended, in a taxation statute.⁵

§ 4. *The certificate of incorporation under the general act cannot legally contain any powers, restrictions, or provisions except those called for by the statute.*—Frequently the incorporators desire to obtain more powers than the statute specifies, or to restrict unalterably some of the powers possessed by the corporation, or to regulate in some unalterable way the business of the company. For the purpose of doing so they insert in the certificate of incorporation under the general act special provisions not called for by the act which authorizes the incorporation.

The law is clear that the articles of association of a corporation organized under a general act are allowed to contain only those matters and statements which are required by the statute itself. The incorporators are not at liberty to insert additional provisions and regulations. If such additional provisions and regulations are inserted they are void. The law does not recognize them. They do not constitute a part of the charter, but are rejected as surplusage and extraneous matter. If the articles of association contain the matters required by the statute and also contain additional matters, the former are sufficient to sustain the charter, and the additional matter does not vitiate the legitimate part of the articles, but the additional matter is disregarded by the law as though it had not been written. All of the decisions hold that any statements of restrictions inserted in the articles of association, outside of the statements required

tion to sell it. *Fietsam v. Hay*, 122 Ill. 293 (1887).

For various definitions of franchise, see *Wait, Insolv. Corp.*, § 12.

¹ See § 641, *infra*.

² See § 641, *infra*.

³ See § 641, *infra*.

⁴ *Mayor, etc. v. New York, etc. R. R.*, 143 N. Y. 1 (1894), a case where the title of the act did not meet the constitutional requirements.

⁵ *Adams, etc. Co. v. Kentucky*, 166 U. S. 171 (1897).

by the general act allowing the incorporation, are unauthorized and void.¹

In New York and New Jersey and under the National Banking Act such special provisions are allowed,² and a broad public

¹*Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546 (1856); *Oregon R'y, etc. Co. v. Oregonian R'y*, 130 U. S. 1, 25 (1889); *Albright v. Lafayette, etc. Assoc.*, 102 Pa. St. 411 (1883); *Becket v. Uniontown, etc. Assoc.*, 88 Pa. St. 211 (1878); *Grangers', etc. Ins. Co. v. Kamper*, 73 Ala. 325 (1882); *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Pennsylvania R. R. v. St. Louis, etc. R. R.*, 118 U. S. 290, 307 (1886); *Bigelow v. Gregory*, 73 Ill. 197 (1874); *Rochester Ins. Co. v. Martin*, 13 Minn. 59 (1868); *Western Union T. Co. v. Union Pac. R'y*, 3 Fed. Rep. 1, 4 (1880); *Ancient, etc. Club v. Miller*, 7 Lans. 412 (1873); *People v. Utica Ins. Co.*, 15 Johns. 358 (1818); 75 N. W. R. 874.

A provision cannot be included in a charter under the general act, whereby stockholders are to vote according to their stock. *Commonwealth v. Conover*, 10 Phila. 55 (1873).

Where in addition to the articles of incorporation the statute provides for articles of association, the corporation may in the latter provide for a lien on the stock. *Mohawk Nat. Bank v. Schenectady Bank*, 78 Hun, 90 (1894).

If a charter contains purposes, some of which are legal and some illegal, it is good to the extent of the former. *Galveston Land & Imp. Co. v. Perkins*, 26 S. W. Rep. 256 (Tex., 1894).

A provision in the charter of a manufacturing company organized under the general law, that it may buy, etc., a railroad, does not invalidate the charter, even though it cannot exercise such a power. *People v. Mount Shasta Mfg. Co.*, 107 Cal. 256 (1895). For many decisions on this subject, see ch. XIII, §§ 231-234, notes, *infra*.

In incorporating under the general act no powers can be placed in the articles of incorporation except such powers as the general act authorizes. *People v. Chicago Gas T. Co.*, 130 Ill. 268 (1889).

Where a land company is incorporated under the general act, and the general act does not provide for any statement in the articles of association as regards the amount of debts which the corporation may incur, a provision inserted in the articles of association that "the indebtedness of the company shall not exceed \$500 at any one time" is not a part of the charter. The provision is at the most merely a by-law. The court said: "We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law." *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890).

A provision in the charter that the stock shall be divided in a certain way is binding upon the corporation so far as it is concerned, and upon the parties thereto, but may be contradicted by other evidence of what the agreement really was. *Bates v. Wilson*, 14 Colo. 140 (1890).

Provisions for internal management should not appear in a charter. *Re Stevedores' Beneficial Assoc.*, 14 Phila. Rep. 130 (1880); *Re M. E. Patterson Memorial Church*, 41 Leg. Int. 253 (1884); *Re St. Luke's Church*, 41 Leg. Int. 74 (1884); *Re Central Democratic Assoc.*, 46 Leg. Int. 380 (1889); *Booz's Appeal*, 109 Pa. St. 592 (1885).

² See Part VI, *infra*; also, *Society, etc. v. Meyer*, 52 Pa. St. 125 (1866). Where the statute allows the incor-

policy favors the allowance of them. Nevertheless, under the usual general incorporating act they are void.

The certificate of incorporation may, however, provide that the business shall be two or more of the kinds of business which are authorized by the statute.¹

§ 4a. *By-laws of a corporation.*—According to Blackstone, one of the important features of a corporation is the power to make by-laws. A by-law is a permanent rule of action, in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution in that a resolution applies to a single act of the corporation, while a by-law is a permanent and continuing rule, which is to be applied on all future occasions.² The power to make by-laws is always stated to be one of the essential incidents and rights of a corporation. This power exists at common law. Frequently, however, it is given by the charter or statutes.³

By-laws are to be made by the stockholders in meeting assembled. The stockholders have few functions to perform, and this right to make by-laws is an essential and important one. The directors have no inherent power to make by-laws.⁴ But

porators to include special provisions in their articles of incorporation, and a lien right is inserted, and the certificate of stock on its face refers to the articles of association, a purchaser of a certificate buys subject to such lien. *Gibbs v. Long Island Bank*, 83 Hun, 92 (1894).

¹ *Bird v. Daggett*, 97 Mass. 494 (1867). A statement in the articles of incorporation that the company may carry on such business as it thinks to be for the benefit of the stockholders is void. *Re Crown Bank*, L. R. 44 Ch. D. 634 (1890).

Charters for enumerated objects "and other purposes" will be rejected. *Re Journalists' Fund*, 8 Phila. 272 (1871). So as to mining for "minerals." *Re Glenwood Co.*, 6 Pa. Co. Ct. Rep. 575 (1889).

² Quoted and approved in *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894).

³ *People v. Crossley*, 69 Ill. 195 (1873); *Kearney v. Andrews*, 10 N. J. Eq. 70

(1854); *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.) 29 (1817); *Juker v. Commonwealth*, 20 Pa. St. 484 (1853); *Newling v. Francis*, 3 T. R. 189 (1789), the last two cases holding that at common law the corporation may make by-laws regulating elections.

⁴ *Morton, etc. Co. v. Wysong*, 51 Ind. 4 (1875), holding that a by-law made by the directors is void; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249 (1880); *Brinkerhoff, etc. Co. v. Home Lumber Co.*, 118 Mo. 447 (1893), holding that a by-law made by the directors restricting the right to sell stock is void. A by-law may arise by custom. *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324 (1827). See *Re Regents', etc. Co.*, 2 W. N. 79 (1867). See also *Rex v. Head*, 4 Burr. 2515 (1770), where Lord Mansfield said "that the body at large had no power to make by-laws, because that power is, by the charter, given to the common council, consisting of the mayor

the stockholders may delegate to the directors the power to make by-laws.¹ Frequently the charter confers this power upon the directors.²

Where the statute states for what purpose by-laws may be passed, none others can be passed.³ Where the by-laws conflict with the charter, the charter prevails.⁴ By-laws must be reasonable; they must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land. This general rule, however, can be understood only by a study of the cases themselves, a collection of which is given in the notes.⁵

and aldermen; and the common council could not by a by-law take away from the body at large the right of election which the charter had vested in the whole body." Unless authorized by the charter the board of directors have no power to make by-laws, nor to alter, amend, or repeal the same (*United Fire Assoc. v. Benesman*, 4 W. N. Cas. (Pa.) 1—1877); but when charter authority to enact by-laws is conferred upon the board of directors, they may validly adopt a by-law authorizing voting by proxy at all meetings of the corporation (*Wilson v. American Acad. of Music*, 43 Leg. Int. 86—1886); and even in the absence of authority the affirmations and acquiescence of a member may estop him from questioning the mode in which the by-laws have been enacted (*Morrison v. Dorsey*, 48 Md. 461—1877).

¹ *Rex v. Spencer*, 3 Burr. 1827, 1837 (1766), where Lord Mansfield said that, "where the power of making by-laws is in the body at large, they may delegate their rights to a select body." See also, in an association, *Heintzelman v. Druids' Relief Assoc.*, 38 Minn. 138 (1888). Although the stockholders authorize the directors to make by-laws, yet the directors cannot change or act contrary to a by-law made by the stockholders.

Stevens v. Davison, 18 Gratt. (Va.) 819 (1868). City officials having power to elect new burgesses may delegate that power. *Rex v. Westwood*, 7 Bing. 1 (1830). So, also, as to the election of aldermen. *Rex v. Ashwell*, 12 East, 22 (1810).

² See Part VII, *infra*. See also *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124 (1845); *Samuel v. Holladay*, Woolw. 400 (1869); S. C., 21 Fed. Cas. 306; *Commonwealth v. Gill*, 3 Whart. (Pa.) 228 (1838). A by-law made by the stockholders instead of by the directors as prescribed by charter is nevertheless binding as to past acts on participating stockholders. *People v. Sterling Mfg. Co.*, 82 Ill. 457 (1876).

³ *Ireland v. Globe, etc. Co.*, 32 Atl. Rep. 921 (R. I., 1895).

⁴ *Republican, etc. Mines v. Brown*, 58 Fed. Rep. 644 (1893).

⁵ Thus, the by-laws cannot modify the articles of incorporation in any of the particulars required by statute to be stated in the articles of incorporation. *Guinness v. Land Corp.*, L. R. 22 Ch. D. 349 (1882). A by-law may authorize stockholders to vote by proxy. *People v. Crossley*, 69 Ill. 195 (1873). See, also, § 610, *infra*. A by-law may give the corporation a lien on stock for debts due to it from the stockholders. See ch. XXXI,

Frequently the by-laws provide that the contracts of the corporation shall be authorized only in a certain way, and shall

infra. But cannot give the corporation the right to forfeit stock for non-payment of calls. See ch. VIII, *infra*. A by-law allowing a stockholder to return his stock to the corporation at a fixed value is illegal. *Vercoutere v. Golden State Land Co.*, 116 Cal. 410 (1897). A by-law cannot release stockholders from their statutory liability. *Wells v. Black*, 117 Cal. 157 (1897). A by-law prohibiting a stockholder from applying for dissolution in accordance with the statute is invalid. *Re Peveril, etc., Ltd.*, 77 L. T. Rep. 505 (1897). By-laws may regulate the manner of voting. *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.) 29 (1817); *Juker v. Commonwealth*, 20 Pa. St. 484 (1853). May require bonds to be given by cashiers. *Bank of Wilmington v. Wollaston*, 3 Harr. (Del.) 90 (1840); *Hannibal Sav. Bank v. Hunt*, 72 Mo. 597 (1880). May prescribe qualifications for admission to membership. *Regina v. Saddlers' Co.*, 10 H. L. Cas. 404 (1863). A by-law is illegal if it disturbs the vested property rights of the stockholders. *Kent v. Quicksilver, etc. Co.*, 78 N. Y. 159 (1879), where preferred stock was issued. So, also, a by-law which provides for the administration of an oath to stockholders who vote is illegal. *People v. Kip*, 4 Cow. 382, n. (1825). If the by-law is illegal its effect cannot be obtained by printing it upon the face of the certificate of stock. *Conklin v. Oswego Nat. Bank*, 45 N. Y. 655 (1871), involving a lien on stock. A by-law by the directors excluding one of them from examining the corporate books is void. *People v. Throop*, 12 Wend. 183 (1834). A by-law restricting the right of members of a church to vote as authorized by statute is void. *People v. Phillips*, 1 Denio, 388 (1845). A by-law may be good in part. *Rogers v. Jones*, 1 Wend. 237 (1828). A by-law

of a bank that mistakes in pass-books must be corrected at once does not bind a depositor. *Mechanics', etc. Bank v. Smith*, 19 Johns. 115 (1821). A by-law that any five of a board of twenty-three directors should be a quorum for transacting business is valid. This is equivalent to an executive committee, except that the members may shift. *Hoyt v. Thompson*, 19 N. Y. 207, 216 (1859). By-laws may regulate the calling of meetings. *Taylor v. Griswold*, 14 N. J. L. 222 (1834). A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313 (1855). By-laws imposing fines for non-attendance or for refusal to accept office are valid, but a by-law making assessments is invalid. *Tobacco Pipe Makers v. Woodroffe*, 7 B. & C. 838 (1828). A by-law that voluntary contributions will be refunded is a contract which a contributor may enforce. *Davis v. Second Union Meeting-house*, 49 Mass. 321 (1844). A by-law imposing penalties for past acts is void. *Pulford v. Detroit Fire Dep't*, 31 Mich. 458 (1875). A by-law that transfers of stock are subject to the approval of the directors is void as against the rights of third persons. *Farmers', etc. Bank v. Wasson*, 48 Iowa, 336 (1878). See also § 621a, *infra*. Or the approval of the president. *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829). A by-law restricting the right of electors in a town to vote is void. *Rex v. Spencer*, 3 Burr. 1827 (1766); *Rex v. Head*, 4 Burr. 2515, 2521 (1770). It has been held that the by-laws of a building association cannot impose an unreasonable fine for non-payment of assessments. *Lynn v. Freemansburg, etc. Assoc.*, 117 Pa. St. 1 (1887). It is legal for the by-laws to provide

be signed by certain officers in order to be valid corporate obligations. Such a by-law, however, does not affect the validity

that the company may sell out all of its property at any time. *Cotton v. Imperial, etc. Corp.*, [1892] 3 Ch. 454. The by-laws of a voluntary association—an exchange—forbidding the members from carrying on dealings outside of the exchange is legal. *American, etc. Co. v. Chicago, etc. Exch.*, 143 Ill. 210 (1892). A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director. *Cross v. West Virginia, etc. R'y*, 37 W. Va. 342 (1892). A stockholder who is given a copy of the by-laws upon his becoming a stockholder is not bound to know that there are other by-laws not included in them. *McKenney v. Diamond, etc. Assoc.*, 8 Houst. (Del.) 557 (1889). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. *Matthews v. Associated Press*, 61 Hun, 199 (1891). Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. *Compton v. The Chelsea*, 128 N. Y. 537 (1891). Where a land company is incorporated under the general act, and the general act does not provide for any statement in the articles of association as regards the amount of debts which the corporation may incur, a provision inserted in the articles of association that “the indebtedness of the company shall not exceed \$500 at any time” is not a part of the charter. The pro-

vision is at the most merely a by-law. The court said: “We think that the limitation of \$500 in the charter of the corporation cannot be regarded of any more force than a by-law.” *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890).

A by-law authorizing the corporation to sue a subscriber for the difference between the subscription and the price for which the stock sold on forfeiture is void. *Jay Bridge Corp. v. Woodman*, 31 Me. 573 (1850); *Kennebec R. R. v. Kendall*, 31 Me. 470 (1850). See also ch. VIII, *infra*. The following by-laws have been held void: compelling members of an exchange to submit their controversies to arbitration on pain of expulsion or suspension, *State v. Union Merchants' Exchange*, 2 Mo. App. 96 (1876); providing that suits to collect insurance shall be brought in the county where the company exists, *Nute v. Hamilton Mut. Ins. Co.*, 73 Mass. 174 (1856); enlarging the liability of stockholders for debts of the corporation, *Free School Trustees v. Flint*, 54 Mass. 539 (1847); certainly so where the creditor did not expressly rely on the by-law, *Flint v. Pierce*, 99 Mass. 68 (1868); or where an assignee of the corporate creditor seeks to enforce the liability, *Gamwell v. Pomeroy*, 121 Mass. 207 (1876); see also § 241, *infra*; authorizing less than a majority of directors to act when the statute required a majority, *State v. Curtis*, 9 Nev. 325 (1874); compelling stockholders to retire a part of their stock, *Bergman v. St. Paul, etc. Assoc.*, 29 Minn. 275, 282 (1882); prohibiting the use of the company's canal on Sundays, *Calder, etc. Nav. Co. v. Pilling*, 14 M. & W. 76 (1845); restricting the members as to their fishing business, *Adley v. Whitstable Co.*, 17 Ves. Jr. 315 (1810); 19 Ves. Jr. 304 (1815); restricting the

of a contract executed in violation of the by-law, so far as such contract affects persons having no knowledge of the by-law.¹

A by-law authorizing the forfeiture of stock for non-payment of a call is discussed elsewhere;² as is also the right of the corporation to create a lien on stock by by-law.³ There are no particular rules in regard to the method of enacting, amending or repealing by-laws.⁴ A company cannot contract not to alter its by-laws.⁵

number of apprentices which members may have, *Rex v. Coopers' Co.*, 7 T. R. 543 (1798); *Rex v. Tappenden*, 3 East, 186 (1802); restricting the sale of guns, *Gunmakers v. Fell, Willes*, 384 (1742); restricting the transfer of seats in an exchange, *Ritterband v. Baggett*, 42 N. Y. Super. Ct. 556 (1877). Railroad regulations as to passengers, etc., are not by-laws. Their validity, however, depends on their reasonableness. *State v. Overton*, 24 N. J. L. 435 (1854). The by-laws of a city cannot exclude from business all painters who do not belong to a guild. *Clark v. Le Cren*, 9 B. & C. 52 (1829). See, however, as to city by-laws, 1 Dillon, *Mun. Corp.*, ch. 12, etc. If a by-law is divisible, the invalidity of part does not invalidate the remaining part. *Amesbury v. Bowditch, etc. Co.*, 72 Mass. 596 (1856). For a valuable statement of the law in relation to by-laws, see *Re Long Island R. R.*, 19 Wend. 37, 41 (1837); Lumley, *By-laws* (English, 1877); 2 Am. & Eng. Ency. L. 705. By-laws are construed as they are construed by the corporation, if that construction be reasonable. *State v. Conklin*, 34 Wis. 21 (1874). By-laws are binding on all members. *Cummings v. Webster*, 43 Me. 192 (1857). But strangers are not bound to know them. *Kingsley v. New England, etc. Co.*, 62 Mass. 393 (1851), where the by-law was printed on an insurance policy; *Wait v. Smith*, 92 Ill. 385 (1879); *Royal Bank, etc. Case*, L. R. 4 Ch. App. 252 (1869). See also § 725, *infra*, relative to contracts by

agents in violation of by-laws. A by-law cannot give the president a casting vote in addition to his regular vote. *State v. Curtis*, 9 Nev. 325 (1874). A by-law which prohibits members from working with persons who are not members is void. *Thomas v. Mutual Protective Union*, 49 Hun, 171 (1888). *Cf. S. C.*, 121 N. Y. 45 (1890).

¹ See § 725, *infra*.

² See § 123, *infra*.

³ See §§ 522, 524, *infra*.

⁴ They need not be written. *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324, 413 (1827). The corporation may adopt Cushing's Manual. *People v. American Institute*, 44 How. Pr. 468 (1873). By-laws may be modified by usage. *Henry v. Jackson*, 37 Vt. 431 (1865). The charter may require by-laws to be enacted under seal. *Dunston v. Imperial, etc. Co.*, 3 B. & Ad. 125 (1832). If amendments to the by-laws are, by the by-laws, to be made only after notice, that notice is necessary. *French v. O'Brien*, 52 How. Pr. 394 (1876). Directors may disregard their own by-laws. *Martino v. Commerce F. Ins. Co.*, 47 N. Y. Super. Ct. 520 (1881). Power to make by-laws implies power to repeal them. *Rex v. Ashwell*, 12 East, 22 (1810). By-laws of mutual insurance associations may be changed. *Supreme Lodge, etc. v. Knight*, 117 Ind. 489 (1889). A by-law may be repealed by a resolution inconsistent with it. *Royal Bank, etc. Case*, L. R. 4 Ch. App. 252 (1869).

⁵ *Malleson v. National, etc. Corp.*,

§ 5. *Mistakes, irregularities and illegalities in becoming incorporated.*—Often it happens that mistakes are made in organizing a corporation. The certificate of incorporation may be defective, or it may not be filed or published as required by the statutes, or the corporation itself may be irregularly organized thereafter. Complicated questions then arise as to the rights and liabilities of the various parties. Stockholders cannot set up such irregularities as a defense to an action by the corporation to enforce their subscriptions to stock.¹ Corporate creditors cannot hold the stockholders liable as partners by reason of the irregular incorporation.² Indeed, the general rule now is, with few exceptions, that no one can question the regularity of the incorporation except the state, where the statutes allow incorporation and the company has endeavored to incorporate and is acting as a corporation.³ But where the purpose for which the corporation is organized is illegal or not specified in the act authorizing the incorporation, then the rule is different.⁴

§ 6. *“Dummy” corporations — Fraudulent corporations — The court will sometimes ignore the corporate existence in order to do justice — Corporations as distinguished from partnerships.*—A corporation is an entity and existence separate from its officers and stockholders. And the inclination of some writers to assimilate a corporation as nearly as possible to a

70 L. T. Rep. 157 (1893), holding that a provision in the by-laws that the subscriptions should be called in at certain times only may be modified. In New Jersey it has been held that a provision in the by-laws that they shall not be changed except on a two-thirds vote is legal and binding when the original by-laws so provided and the enterprise was organized on that basis. *Loewenthal v. Rubber, etc. Co.*, 52 N. J. Eq. 440 (1894), holding also that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. Although the by-laws provide for changes therein only on a two-thirds vote, yet a majority may

make changes. *Smith v. Nelson*, 18 Vt. 511 (1846).

¹ See § 183, *infra*.

² See §§ 231–239, *infra*.

³ See § 637, *infra*. For a detailed digest of the decisions on what may and what must be stated in certificates of incorporation and what informalities will be fatal, and what meaning is given to the usual provisions of general statutes for incorporations, see also 12 Am. R. R. & Corp. Cases, pp. 474–522.

⁴ See ch. XIII, *infra*.

The organization of a company to carry on the lottery business in foreign countries was held legal in *Macnee v. Persian Investment Corp.*, L. R. 44 Ch. D. 306 (1890).

partnership and to apply to the former the rules applicable to the latter leads only to confusion and is contrary to the law.¹

The difference between a corporation and a partnership and the advantages of a corporation over a partnership as a means of doing business are very marked and should not be limited by construction.²

¹The House of Lords in England has pointed out the fact that there is no real analogy between an ordinary partnership and a corporation. *Birch v. Cropper*, L. R. 14 App. Cas. 525 (1889), (reversing *Re Bridgewater Nav. Co.*, L. R. 39 Ch. D. 1), refusing to apply the analogy and saying that to apply it would in the case before it "work inequality and injustice and not equity."

A trading corporation is governed by the ordinary rules of partnership, except so far as special conditions may be inserted into their constitution by the legislature or by their own articles of association. *Oakes v. Turquand*, L. R. 2 H. L. 325 (1867), as referred to in *Whiting v. Hovey*, 13 Ont. App. 7 (1886).

In speaking of the fact that decisions concerning municipal corporations and the powers of their officers are not at all applicable to private corporations, *Ruger, C. J.*, in *Wallace v. Walsh*, 125 N. Y. 26, 36 (1890), said: "It is manifest that no analogy exists between the action of a body of men invested with the exercise of political power under special conditions and the action of the trustees of a private corporation in the conduct of its ordinary business operations. The one relates to the execution of powers and the other to the performance of duties and the enjoyment of privileges. The one is controlled by the principles governing the relations of principal and agent, and the other to the general rules regulating the consequences following a neglect or disobedience

of the requirements of statutes affecting private relations. In the one case the question as to what is a good execution of a power is involved, and in the other as to what may be considered an adequate performance of a duty. These questions are manifestly controlled by different rules, and that which is required in one is not an authority for the requirements of the other."

²There are certain advantages which a corporation presents as compared with a copartnership.

In large enterprises the partnership has been found to be clumsy, dangerous and insufficient. If unsuccessful it brings ruin upon all of its members, because each partner is liable absolutely for all debts. Any member may bind the firm by his contract and each one has an equal voice in deciding its policy. Its capital and credit, and consequently its amount of business, are limited necessarily by the capital and credit of a very few men — the members themselves. The death of a member or the transfer of his interest dissolves the firm. Any member may arbitrarily cause a dissolution at any time, and the insolvency of a member renders the partnership property subject to levy of execution for his debt. Upon the death of a partner the surviving partners have the sole charge of winding up the business, and the executor of the deceased partner is not allowed to come in. A partner may withdraw his money only at a sacrifice, or by long and expensive proceedings. He cannot conveniently

A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person.¹ Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues and they are not thereby merged.²

sell his interest or borrow money upon it. New partners cannot readily or safely be admitted.

The partnership is restricted in its capital, dangerous in its liabilities, narrow in its exclusion of new members, too free in its mode of making contracts, and too contracted in its opportunities for withdrawal. It is becoming obsolete as a mode of doing business on a large scale.

In a corporation all this is changed. The members are not liable for the debts. The amount already invested may be lost, but the private fortunes of the stockholders are not involved. The business is done and contracts made not by all, but by a select few, called directors. A large capital is created by the union of funds from many sources. A person may safely invest in many enterprises and yet not take part in the management nor watch the business of any one of them. The leading spirit in an enterprise may hold a majority of the stock and may admit associates, employees or strangers as holders of a minority of the stock, and yet he will retain the management as though he were the single owner of the concern. Persons may easily buy into or retire from the enterprise. Dissolution is not brought about by the death or withdrawal or dissatisfaction of a stockholder. The insolvency of a stockholder does not affect the business of the corporation. Upon the death of a stockholder his executor votes his stock and has a voice in the continuation of the business. A stock-

holder may sell or pledge his interest readily and intelligibly by reason of the reports, dividends and market quotations of his stock. The corporation is a protection in that the liability is limited; it is capable in that it renders possible the collection of a great capital; it is efficient because the directors and they alone govern its policy and its contracts; and it is convenient because it is easy to sell or buy or pledge or bequeath one's interest in the concern.

The advantages of incorporation are set forth in the Law Quarterly Review for April, 1895 (p. 185), as follows: "Incorporation secures first of all the benefit of limited liability. It further preserves the continuity of the partnership unaffected by the death, lunacy or bankruptcy of the members or by other contingencies. It minimizes the dangers of a dishonest partner by restricting the agency of the directors in articles of which all persons dealing with the company have constructive notice. It facilitates dealing with the shares of the partners by sale, mortgage or settlement. It affords greater facilities for borrowing, more particularly for raising money on debentures. A shareholder who lends money to the company is not at the disadvantage of being postponed to other creditors as an ordinary partner is who lends to the firm."

¹ § 709, *infra*.

² Quoted and approved in *Exchange Bank v. Macon, etc. Co.*, 97 Ga. 1 (1895). See, also, § 663, *infra*.

Not only is the identity of the corporation preserved as distinct from its stockholders, but it is also distinct from its promoters, incorporators and antecedents. It is not liable on the contracts and obligations of its promoters.¹ Nor is it liable for the debts of a prior corporation to whose property it succeeds by foreclosure sale.² Where a partnership or a corporation is merged into another corporation, the creditors of the former may pursue the property, but they cannot hold the latter corporation liable for the debt,³ unless the latter took with such notice that it may be held to account.⁴

But there are occasions where the courts will ignore the corporate existence and will hold that its acts are the acts of its stockholders and *vice versa* the same as in a partnership. Thus, where an individual organizes a corporation to violate a contract which he himself would not be allowed to violate, the court will enjoin the corporation as though it were the person himself.⁵ So, also, where a director causes the corporation to give a valuable contract to a corporation in which he is secretly interested, this may be the same as though he were interested in a firm which received that contract.⁶ Property acquired by and in the name of a "dummy" corporation may be held to be subject to a mortgage executed by the owner of such "dummy" corporation.⁷ A contract between three local companies by which one runs over the tracks of another for a consideration paid to the third is legal as to the second corporation where such second corporation is a mere dummy of the third corporation and the earnings of both corporations went together.⁸ A corporation may be held liable for the fraud of its board of directors against another corporation which the same board controlled.⁹ The New York court of appeals have said: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth."¹⁰

This same principle applies to trade combinations of corpo-

¹ See § 707, *infra*.

² See § 890, *infra*.

³ See § 673, *infra*, and ch. II.

⁴ See § 673, *infra*.

⁵ See ch. XXXIX, *infra*.

⁶ *Id.*

⁷ See § 857.

⁸ *Union Pac. R'y v. Chicago, etc. R'y*, 163 U. S. 564, 592 (1896).

⁹ *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894).

¹⁰ *Anthony v. American Glucose Co.*, 146 N. Y. 407 (1895), holding that, where one corporation sells out to

rations called "Trusts."¹ The corporate existence will be disregarded and the acts and contracts of the persons holding all the stock will be considered the acts and contracts of the corporation itself, where the effect is the same as though the corporation had acted or contracted as a corporation. Hence, where all the stock is combined with all the stock of other companies in order to form a combination which is illegal, the state will forfeit the charter of the corporation, although technically it is not a party to the agreement.²

It was held by the lower courts in England that where a merchant incorporates a company to take over the business, he being practically the only stockholder, he is liable personally for all the corporate debts, on the theory that the corporation was a fraud or a mere "dummy." The House of Lords, however, very properly reversed this decision.³

§ 7. *Classes of corporations, and the class considered herein.*—For the better understanding of the law of corporations, and for the treatment of special branches of that law, the early writers, like Kyd, Blackstone, Kent, Angell and Ames, and many subsequent authors, subdivided corporations into distinct classes. These subdivisions have been made on various principles of classification. When divided with respect to the members of corporations they are aggregate and sole. As regards their functions they are public, such as cities and towns; quasi-public, such as counties and school districts; and private; and again private corporations are divided into ecclesiastical and lay; and still further, lay corporations are divided into eleemosynary or charitable, and civil, the latter of which include all private corporations that are created for temporal purposes, such as banking, insurance, trading, railroad, manufacturing, turnpike, bridge and canal corporations, and certain

another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.

¹ See ch. XXIX, *infra*.

² Id.; also, *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892).

³ *Salomon v. Salomon, etc. Co.*, [1897], A. C. 22, reversing *Broderip v. Salomon*, [1895] 2 Ch. 323. See also

Munkittrick v. Perryman, 74 L. T. Rep. 149 (1896), where the court held that two partners might incorporate and that they would not thereafter be personally liable on the contracts of the company. The court, however, intimated that if both of the partners and the corporation had been before the court a different conclusion might have been reached.

educational institutions. The tendency of the times, however, is to hold that railroads are more than private corporations. The latest opinion is that they are public corporations.¹

A domestic corporation is one that has been organized under the laws of the state referred to. A foreign corporation is one that has been organized under the laws of another state or of a foreign government. An alien corporation is one that has been organized under the laws of a foreign government.²

At an early day private corporations for business purposes were few in number and of little importance in the law. Chancellor Bland, of Maryland, believed that no instance of such a corporation in the colonial times of America could be found.³ Judge Baldwin, of Connecticut, however, calls attention to the

¹ *United States v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 321 (1897), where the court say: "It cannot be disputed that a railroad is a public corporation, and its business pertains to and greatly affects the public, and that it is of a public nature." Concerning the question of whether a railroad company is a private corporation, the court said in *Pierce v. Commonwealth*, 104 Pa. St. 155 (1883): "Railroad and canal companies are private corporations. This we have decided in point twice within the last two years; once in the case of *Timlow v. Philadelphia, etc. R. R.*, 99 Pa. St. 284 (1882), and again in the case of *Pittsburgh, etc. R. R. v. Bruce*, 102 Pa. St. 23 (1882). . . . So in the case of *Presbyterian Soc. v. Auburn, etc. R. R.*, 3 Hill, 567 (1842), it is said that a railroad company is not public nor does it stand in the place of the public; it is but a private corporation over whose rails the public may travel if they choose to ride in its cars. Indeed, we regard it as a misnomer to attach even the name 'quasi-public corporation' to a railroad company, for it has none of the features of such corporations, if we except its qualified right of eminent domain, and this it has because of the right reserved to the public to

use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking-house. Its road may be called a quasi-public highway, but the company itself is a private corporation and nothing more." To same effect, see *Black v. Delaware, etc. Co.*, 24 N. J. Eq. 455, 469 (1873). That a railroad is a quasi-public corporation, see *Chicago, etc. R'y v. Wabash, etc. R'y*, 61 Fed. Rep. 993 (1894). See also § 891, *infra*, and the various sections of ch. LV.

A mining and manufacturing corporation is a private corporation. *Wolfe v. Underwood*, 91 Ala. 523 (1891).

A cemetery corporation is a private corporation. *Pokrok, etc. Co. v. Zizkovsky*, 42 Neb. 64 (1894). See the various sections of ch. LV, *infra*, on this subject.

² An English corporation is an alien corporation. *Eureka, etc. Co. v. Richmond, etc. Co.*, 2 Fed. Rep. 829 (1880).

The residence of a corporation is the town or city specified in its articles of incorporation. *Rossie Iron Works v. Westbrook*, 59 Hun, 345 (1891).

³ *McKim v. Odom*, 3 Bland, Ch. (Md.) 407, 418 (1829). For a list of

fact that the "New London Society for Trade and Commerce United" was incorporated by the Colony of Connecticut in 1731, and that it not only had a capital stock but issued circulating bills as currency. It is true, however, that during the eighteenth century private corporations for profit were of small consequence. But the past seventy-five years have completely reversed the relative importance of the different classes of corporations, and, at the present time, private corporations for business purposes have completely overshadowed all other kinds.

With this change there is a decided tendency to re-classify the subject, and the modern treatises on corporation law have recognized the fact that old classifications are to be disregarded, and that corporations are to be divided into joint-stock corporations, or those having a capital stock, and corporations without a capital stock. Indeed, the modern text-books on corporations treat very little of the older classes of corporations and the principles which govern them, but fully and explicitly of corporations having a capital stock.

This change is due largely to the remarkable growth of the law regulating the one prominent difference between the two classes. That feature is that corporations with a capital stock have stock and stockholders, while corporations without a capital stock have none, and are governed largely by principles of law that have changed little since the days of Blackstone, Kyd and Kent. It is with this feature of modern corporations, that of stock and stockholders, as distinguished from the characteristics of the early corporations, which have sunk into comparative unimportance,¹ that the present work is concerned.

§ 8. *Corporations having a capital stock — Definition of capital stock.*—The questions which arise in connection with cor-

the first incorporated business companies in America, see Harvard Law Review, Nov. 1888, p. 165.

¹ In the case of *McKean v. Biddle*, 37 Atl. Rep. 528 (Pa., 1897), it appears that a mutual insurance company had not paid dividends for one hundred and thirty years, but had gradually accumulated a surplus of over \$4,000,000. The court held that it

might resume the payment of dividends.

¹ The subject of municipal corporations would seem to form an exception to this statement were it not that the great and deservedly successful work of Judge Dillon on Municipal Corporations has clearly stated, and thereby settled, most of the difficult subjects connected with that branch of the law.

porations having a capital stock may be divided into two groups. The first includes those principles of law which affect all corporations, whether they have a capital stock or not. Of such a kind are the old questions of how a corporation shall contract; whether a seal be necessary; whether and how it may act through an agent; the right to sue and be sued in various courts; and to hold and dispose of property. These questions, capacities and incidents, for the most part, have become so well settled as to give rise to comparatively little litigation at the present day.

On the other hand, it is believed that the modern law of corporations, as regards its litigated questions, its unsettled principles, its new problems and its rapidly crystallizing results, is the law of stock and stockholders. This law involves the issue of stock and the rights, duties, liabilities and miscellaneous incidents of stockholdership. Indeed, it may be said that the law of stock and stockholders is the proper standpoint from which to treat of general corporation law. It is upon this theory that this work has been written.

Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors.¹ The capital stock is to be clearly distinguished from the amount of property possessed by the

¹ Quoted and approved in *American, etc. Co. v. State Board*, 56 N. J. L. 389 (1894); *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634 (1895), and in *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1 (1892). For various definitions see *Barry v. Merchants' Ex. Co.*, 1 Sandf. Ch. 280, 305 (1844); *Christensen v. Eno*, 106 N. Y. 97, 100 (1887); *Hightower v. Thornton*, 8 Ga. 486, 500 (1850); *Hannibal, etc. R. R. v. Shacklett*, 30 Mo. 550, 558 (1860); *St. Louis, etc. R. R. v. Loftin*, 30 Ark. 693, 709 (1875); *Bent v. Hart*, 10 Mo. App. 143, 146 (1881); *Mutual Ins. Co. v. Erie County*, 4 N. Y. 442 (1851); *Bailey v. Clark*, 21 Wall. 284 (1874), where Field, J., says "it applies only to the property or means contributed by the stockholders as the fund or

basis for the business or enterprise for which the corporation or association was formed;" *Jones v. Davis*, 35 O. St. 474, 476 (1880); *Railway Co. v. Furnace Co.*, 49 O. St. 102 (1892); *Burrall v. Bushwick R. R.*, 75 N. Y. 211 (1878), where Folger, J., defines it as "that money or property which is put into a single corporate fund by those who, by subscription therefor, become members of the corporate body;" *Williams v. Western Union Tel. Co.*, 93 N. Y. 162, 188 (1883), where Earl, J., tersely says it is "the property of the corporation contributed by its stockholders or otherwise obtained by it, to the extent required by its charter;" *Sanger v. Upton*, 91 U. S. 56, 60 (1875); *State v. Morristown Fire Assoc.*, 23 N. J. L. 195 (1851);

corporation. Occasionally it happens that, under the terms of statutes relating to taxation which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation.¹ But this is for the purpose of carrying out the intent of the statute, and is not the real meaning of the term. At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value and may be diminished by losses or increased by gains. The term "stock"² has been used at times to indicate the same thing as capital stock. Generally, how-

State v. Cheraw, etc. R. R., 16 S. C. 524 (1881). "The capital of a corporation is the property or means which the corporation owns, and it may vary in amount, while the capital stock is fixed, and represents the interests of the stockholders, and is their property." *Wells v. Green Bay, etc. Co.*, 90 Wis. 442 (1895). A savings bank corporation may be formed without any capital stock, the profits going to depositors. *Huntington v. Savings Bank*, 96 U. S. 388 (1877). Such is the statute law of New York.

For a definition of capital stock, see *People v. Coleman*, 126 N. Y. 433 (1891).

"Capital stock of a corporation is a different thing from shares of stock. *Lycoming Co. v. Gamble*, 47 Pa. St. 106, 110 (1864). The capital stock represents the property and assets of the company, which may consist in whole or in part of real estate. The certificates or shares of stock are the evidence of an interest which the holder has in the corporation, and it is well settled that this interest is personal property." *Wilkes Barre, etc. Bank v. Wilkes Barre*, 148 Pa. St. 601 (1892).

Where the charter gives power to borrow, not exceeding one-half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter.

Commonwealth v. Lehigh Avenue R'y, 129 Pa. St. 405 (1889).

¹Quoted and approved in *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623 (1895); *Ohio, etc. R. R. v. Weber*, 96 Ill. 443 (1880); *Philadelphia v. Ridge Ave., etc. R'y*, 102 Pa. St. 190 (1883); *Security Co. v. Hartford*, 61 Conn. 89 (1891). In New York the words "capital stock" as used in the tax laws is construed to mean actual property and not share capital. *People v. Coleman*, 126 N. Y. 433 (1891); *People v. Wemple*, 150 N. Y. 46, 50 (1896).

²*Burr v. Wilcox*, 22 N. Y. 551, 556 (1860); *People v. Tax Commissioners, etc.*, 23 N. Y. 192, 220 (1861); *Bailey v. Railroad Co.*, 22 Wall. 604, 637 (1874). Formerly government bonds were called "stock," both in England and in this country. *People v. Tax Commissioners*, 2 Black, 620 (1862); *Weston v. Charleston*, 2 Pet. 449 (1829); *Cavanagh, Law of Money Securities* (2d ed.), 488-494. This use of the term still prevails in England, but is generally obsolete in this country, although the securities of the city of New York are still called "stock."

In tax statutes, "stock" may be defined to mean shares of stock. *Lockport v. Weston*, 61 Conn. 211 (1891).

ever, it means shares of stock, and in this sense it is used in this treatise. Where a stock corporation has received no stock subscription and issued no stock it cannot maintain a suit.¹

§ 9. *Is the capital stock a trust fund for the benefit of corporate creditors?* — In 1824 Mr Justice Story, in a celebrated case,² originated and announced the doctrine that the capital stock of a corporation is a trust fund, so far as corporate creditors are concerned, and should be protected and administered as a trust fund by courts of equity. This doctrine was supposed to have been adopted by the supreme court of the United States,³ and by the courts of nearly every state of the Union. On this doctrine rest the decisions that unpaid subscriptions for stock cannot be evaded by release, cancellation or fraudulent transfer;⁴ that the holders of "watered" stock issued for cash at less than par or issued fraudulently for property are liable to corporate creditors;⁵ that dividends paid from the capital stock may be recovered back;⁶ and that a corporation cannot use its capital stock to purchase outstanding shares of its capital stock.⁷

In 1893, however, the supreme court of the United States passed again upon this theory of the capital stock being a trust fund, and decided that whatever of trust there is, it is rather a trust in the administration after possession by the court than a trust attaching to the property itself.⁸ This conclusion

¹ Aspen, etc. Co. v. Aspen, 5 Colo. App. 12 (1894).

² Wood v. Dummer, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435.

³ Sawyer v. Hoag, 17 Wall. 610, 620 (1873).

⁴ See §§ 199, 253, 263, *infra*.

⁵ See §§ 42, 46, *infra*.

⁶ See § 548, *infra*.

⁷ See § 312.

⁸ The court said: "While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. . . . In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection

with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its cred-

does not change the law as to subscriptions, "watered stock," dividends and purchases of stock, as mentioned above. It changes only the theory or reasoning upon which that law is based. In this respect the supreme court is in harmony with the English decisions. The trust-fund theory does not exist in England. It is purely an American doctrine. The fact is that the trust-fund theory has beclouded rather than clarified the subject. For instance, on account of this theory some of the courts have fallen into error and held that when a corporation is insolvent it cannot prefer one creditor as against another. The trust-fund theory may well be superseded by the fact that the capital stock of a corporation is like the capital of a business man, and that just as he cannot, as against his creditors, give it away or forgive the debts of those who owe him, so a corporation cannot, as against its creditors, release subscriptions, give away its assets to its stockholders by way of dividends, or buy its own stock with funds which, upon insolvency, belong to its creditors instead of its stockholders.

§ 10. *Definitions of corporator, subscriber, shareholder, stockholder and officer.*—A corporator is one of those to whom a charter is granted, or of those who file a certificate of incorporation under a general incorporating statute.¹ A subscriber is one who has agreed to take stock from the corporation on

itors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." *Hollins v. Brierfield, etc. Co.*, 150 U. S. 371, 381, 383 (1893). To the same effect, see *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205, 227 (1894); *Hospes v. Northwestern, etc. Co.*, 48 Minn. 194 (1892).

¹ *Chase v. Lord*, 77 N. Y. 1, 11 (1879), the court saying: "Corporators exist before stockholders, and do not exist with them. When stockholders come in, corporators cease to be." Cf. *Re Lady Bryan*, 1 Sawy. 349 (1870); S. C., 14 Fed. Cas. 926. In Pennsylvania, under a peculiar statute, it has been held that the incorporators thereof need not be sub-

scribers. See *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43, 54 (1870).

It has frequently been held that where a statute authorizes persons to form a corporation, although the statute does not, in express terms, say that they must be, of full age, yet it is implied that they shall be of full age. *Re Globe, etc. Assoc.*, 63 Hun, 263 (1892). Cf. *Re Laxon*, [1893] 1 Ch. 210 (1892).

A married woman is not at common law qualified to act as an incorporator nor as treasurer. 9 Ry. & Corp. L. J. 197.

A corporation is legally organized although the incorporators are not shareholders as required by statute. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890).

the original issue of such stock.¹ A shareholder in this country means the same thing as a stockholder, and the terms are used interchangeably to indicate one who owns stock in a corporation and has been accepted as a stockholder by the corporation.² A stockholder does not stand in the attitude of a partner towards the corporation. A director is an "officer," and a paying teller may be one within the meaning of a criminal statute.³

§ 11. *Relation of stockholders towards the corporation.*—A corporation may contract with its stockholders to the same extent and in the same manner that it may with any other persons.⁴ Where a state is a stockholder in a railroad corporation,

¹ *Busey v. Hooper*, 35 Md. 15 (1871); *Spear v. Crawford*, 14 Wend. 20, 23 (1835). In the *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341 (1827), the word "subscriber" is elaborately defined, and it is held to mean only such persons as have entered into an express contract to take up a certain definite number of shares. See also a definition at some length by Cooley, J., in *Peninsular R'y v. Duncan*, 28 Mich. 130 (1873).

Subscribers are stockholders, although no certificates have been issued to them and no payments made. *McComb v. Barcelona*, etc. Assoc., 10 N. Y. Supp. 546 (1890).

A "subscription" for stock is different from a "sale." A "subscription" applies to an original issue. *Bates v. Great Western Tel. Co.*, 134 Ill. 536 (1890).

² See *Rosevelt v. Brown*, 11 N. Y. 148, 152 (1854); *State v. Ferris*, 42 Conn. 560 (1875); *Adderly v. Storm*, 6 Hill, 624 (1844); *Worrall v. Judson*, 5 Barb. 210 (1849). Where the registered holder is merely a nominal holder he will not be entitled to special privileges, such as free admission to a place of amusement. *Academy of Music's Appeal*, 108 Pa. St. 510 (1885).

A person is held to be a stockholder, although no certificate has been issued to him. See § 192, *infra*.

Moreover, he may be held to be a stockholder, although he has sold and transferred his certificate of stock, if such transfer has not been recorded on the corporate stock-book. See ch. XV, *infra*.

³ *United States v. Means*, 42 Fed. Rep. 599 (1890).

A director is an officer under a statute making officers liable for debts in certain cases. *Brand v. Godwin*, 8 N. Y. Supp. 339 (1890). The president and directors are "officers" within the meaning of a criminal statute. *Commonwealth v. Wyman*, 49 Mass. 247 (1844). So, also, of the treasurer. *Commonwealth v. Tuckerman*, 76 Mass. 173 (1857). In certain cases an "officer" is construed to mean merely an agent and not a director. So held in regard to appointing a receiver of a foreign corporation. *Moran v. Alvas*, etc. Co., N. Y. Law J., Dec. 5, 1891.

⁴ *Hartford*, etc. R. R. v. *Kennedy*, 12 Conn. 499, 509 (1838); *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833); *Central R. R. v. Claghorn*, 1 Speers' Eq. (S. C.) 545, 562 (1844).

Thus, where one subscribed for stock and paid for it by mortgages payable at times mutually agreed upon between the parties, "this was merely a mode of payment. . . . He stands in two capacities: one as debtor to the association, one as

its rights are no different from those of a private individual who is a stockholder.¹

A stockholder, as a creditor of the corporation, may obtain security for his debt in exclusion of other creditors.²

A stockholder has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation.³ He may sue the corporation or be sued by it, both at law and in equity.⁴

stockholder in it. These capacities are independent of each other." *Ely v. Sprague*, 1 Clarke, Ch. (N. Y.) 351 (1840); *Longley v. Longley Stage Co.*, 23 Me. 39 (1843), holding that where a creditor consented, as a stockholder, to the reorganization of the company which had become indebted to him under the former organization, he had not thereby forfeited his right to recover from the newly-organized corporation, to which he had become a subscriber; *American Bank v. Baker*, 45 Mass. 164, 176 (1842), holding that a corporation vote to compromise certain securities to the detriment of a member who was also a creditor could not be regarded as consented to by him in his absence.

¹*Southern R'y v. North Carolina R. R.*, 81 Fed. Rep. 595 (1897).

²*Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883). See also § 692, *infra*.

³*Hyatt v. Allen*, 56 N. Y. 553 (1874); *Jones v. Terre Haute, etc. R. R.*, 57 N. Y. 196 (1874); *Brundage v. Brundage*, 1 Thomp. & C. (N. Y.) 82 (1873); *Goodwin v. Hardy*, 57 Me. 143 (1869); *Minot v. Paine*, 99 Mass. 101 (1868); *Granger v. Bassett*, 98 Mass. 462 (1868); *Phelps v. Farmers', etc. Bank*, 26 Conn. 269 (1857); *Burroughs v. North Carolina R. R.*, 67 N. C. 376 (1872); *Curry v. Woodward*, 44 Ala. 305 (1870); *Lockhart v. Van Alstyne*, 31 Mich. 76, 78 (1875). See also ch. XXXII.

⁴*Waring v. Cahawba Co.*, 2 Bay

(S. C.), 109 (1797), where this right of a stockholder was the question directly in litigation; *Rogers v. Danby Univ. Soc.*, 19 Vt. 187 (1847); *Culbertson v. Wabash Nav. Co.*, 4 McLean, 544; S. C., 6 Fed. Cas. 944 (1849); *Peirce v. Partridge*, 44 Mass. 44 (1841); *Barnstead v. Empire Min. Co.*, 5 Cal. 299 (1855); *Ex parte Booker*, 18 Ark. 338 (1857); *Sanborn v. Lefferts*, 58 N. Y. 179 (1874); *Cary v. Schoharie, etc. Co.*, 2 Hun, 110 (1874); *Wausau, etc. Co. v. Plumer*, 35 Wis. 274 (1874); *Sawyer v. Methodist Ep. Soc.*, 18 Vt. 405 (1846); *Dunstan v. Imperial, etc. Co.*, 3 B. & Ad. 125 (1832); *Gifford v. New Jersey, etc. Co.*, 10 N. J. Eq. 171 (1854); *Samuel v. Holladay*, 1 Woolw. 400, 418; S. C., 21 Fed. Cas. 306 (1869). A stockholder may collect his debt the same as other creditors. *Lang v. Dougherty*, 74 Tex. 226 (1889). See also *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245 (1883). A grantor of land to a corporation may insist on his vendor's lien even though he is also a stockholder. *Biggs v. Elliston Dev. Co.*, 93 Va. 404 (1896).

A stockholder who is also a director may nevertheless sue to compel his corporation to abate a nuisance. *Leonard v. Spencer*, 108 N. Y. 338 (1888). A stockholder may sue the corporation for an injury done to him by the company by reason of the acts of other stockholders, such as diverting the water from an irrigation canal. *O'Connor v. North Truckee Ditch Co.*, 17 Nev. 245 (1883).

The stockholder is not liable for the debts of the corporation,¹ except so far as his subscription price is unpaid,² and except where a statute renders him liable.³

The admissions or declarations of stockholders do not bind the corporation;⁴ nor do the admissions of one stockholder bind another stockholder.⁵

Notice to individual stockholders is not notice to the corporation, and their knowledge of facts is not notice of those facts to the corporation.⁶ Service of process on a stockholder is not service on the corporation.⁷ A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified.⁸

A stockholder in an insurance company has the same rights as has a stockholder in any other corporation.⁹

The stockholder is an individual, distinct from the corporation in its contracts and transaction of business. The mere fact that he is a stockholder does not make him an agent to contract for it or bind it by his acts.¹⁰

One person may own all the stock, and yet the existence, relations and business methods of the corporation continue.¹¹

¹ See ch. XIII.

² See chs. XI and III, *infra*.

³ See ch. XII, *infra*.

⁴ See § 726, *infra*.

⁵ *Simmons v. Sisson*, 26 N. Y. 264 (1863).

⁶ See § 727, *infra*.

⁷ See § 752, *infra*.

⁸ *Wilgus v. Germain*, 72 Fed. Rep. 773 (1896).

⁹ Thus, a shareholder in an insurance company, conducted on both the stock and the mutual-insurance plan, is entitled to all the rights in the guaranty accumulations that a stockholder in any other corporation has in the corporate assets. *Traders', etc. Ins. Co. v. Brown*, 142 Mass. 403 (1886).

¹⁰ See §§ 708, etc., *infra*.

Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue

law prevents a confiscation of the corporation property. *U. S. v. Distillery*, 43 Fed. Rep. 846 (1890).

Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation, who aided in the perpetration of the fraud, was a stockholder in the corporation. *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891). A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders or the corporation itself might question such a contract, yet subcontractors cannot. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893).

¹¹ See §§ 709, etc., *infra*.

The stockholders, assembled together in a corporate meeting, have the powers to elect officers; make by-laws; increase or reduce the capital stock, if the statute permits; authorize auxiliary or fundamental changes in the charter, if constitutional; and perform a few other acts for and in behalf of the corporation. But there their powers cease. The making of corporate contracts; the management of corporate business; the employment and direction of agents; the bringing or defending of suits, and all the infinite details of corporate management, are under the control of the directors and their agents. The stockholders have no power herein, either individually or in meeting assembled.¹

A stockholder is chargeable with notice of entries made upon the corporate books, if they were made in his presence and he presumably assented thereto.²

A shareholder in a corporation which does not properly insure its property has such an insurable interest in that property that he may recover upon a policy thereon taken in his own name, for an amount which, added to the company's insurance, would cover his interest.³

At common law the stockholder, on account of his interest in the corporation, was not a competent witness for the corporation in a suit in which the corporation was a party.⁴ In some

¹ See § 712, *infra*.

"The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation — the artificial being created — holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." *Humphreys v. McKissock*, 140 U. S. 304 (1891).

² See § 727, *infra*.

³ *Warren v. Davenport F. Ins. Co.*, 31 Iowa, 464 (1871), distinguishing *Phillips v. Knox County Ins. Co.*, 20 Ohio, 174 (1851). Cf. *Seaman v. Enterprise F. & M. Ins. Co.*, 18 Fed. Rep. 250; S. C., 5 McCrary, 558 (1883). See

Greenhood, Pub. Policy, 255; *Angell*, Fire & L. Ins., ch. XI, and cases cited.

A stockholder has an insurable interest in the property of the corporation. *Riggs v. Commercial, etc. Ins. Co.*, 125 N. Y. 7 (1890). A stockholder may insure his interest. *Wilson v. Jones*, L. R. 2 Ex. 129 (1867).

⁴ *Porter v. Bank of Rutland*, 19 Vt. 410 (1847); *McAuley v. York Min. Co.*, 6 Cal. 80 (1856). See cases in next note.

In *Pierce v. Kearney*, 5 Hill, 82 (1843), a shareholder was held incompetent to testify that the defendant, in an action to enforce a statutory liability of stockholders, was a stockholder. Compare, however, *Re Kip*, 1 Paige, 601 (1829), involving the testimony of a corporator and pew-holder in a church corporation; *Mokelumne*,

states, however, this rule has been changed by statute; and in others it is easily evaded by a formal transfer of the certificate of stock to another person.¹ A stockholder is incompetent to

etc. *Co. v. Woodbury*, 14 Cal. 265 (1859), in which, in deciding upon the competency of a stockholder as a witness, the court held that "members of a corporation who are answerable personally for the corporate debts and liabilities stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership." To same effect, *Mitchell v. Beckman*, 64 Cal. 117 (1883).

The president, though a stockholder, is a competent witness for the company if he is willing to testify, since his private interest is greater than his stockholder interest. *Church v. Sterling*, 16 Conn. 388 (1844).

A stockholder who knowingly transfers his stock but expects to get it back is not a competent witness for a corporation. *Bank of Michigan v. Gray*, 1 Q. B. Rep. (Can.) 422 (1841).

A stockholder in a company which is a creditor of a party to a suit may testify in behalf of the latter. *Simons v. Vulcan, etc. Co.*, 61 Pa. St. 202 (1869).

The purchase by a bank of its own stock, in order to enable the stockholder to testify for it, was upheld, though its charter prohibited it from purchasing goods, etc. *Farmers', etc. Bank v. Champlain Transp. Co.*, 18 Vt. 131 (1846).

Washington Bank v. Palmer, 2 Sandf. Super. Ct. 686 (1850), and *New York, etc. R. R. v. Cook*, 2 Sandf. Super. Ct. 732 (1850), are both to the effect that a stockholder is not a party to the action, nor a person for whose immediate benefit it is prosecuted, within the meaning of the code. He is therefore a competent witness.

A stockholder who has nothing to do with the negotiation of a corpo-

rate contract may testify although the other party is dead and the statute prohibits the living party in interest from testifying. *Banking, etc. Co. v. Rood*, 132 Mo. 256 (1896).

The officers or directors of a corporation may testify in its behalf although a statute says that in actions where one party is dead the other party shall not testify. *New Jersey, etc. Co. v. Camden, etc. Co.*, 58 N. J. L. 196 (1895).

A stockholder need not testify against his corporation. *Bank of Oldtown v. Houlton*, 21 Me. 501 (1842).

A stockholder, under the New York statute, cannot testify to a personal communication between the corporation and a deceased person. *Keller v. West, etc. Co.*, 39 Hun, 348 (1886).

A witness who is agent of a corporation, the latter being a party to the suit, is entitled to the same privilege as to libelous statements made by him as witness that a party has. *Nissen v. Cramer*, 104 N. C. 574 (1889).

The plaintiff in a suit against a corporation may offer a stockholder as a witness. *Hart v. New Orleans, etc. R. R.*, 1 Am. St. R'y Dec. 4 (La., 1841).

¹That a transfer will render the transferrer competent, see *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236 (1844); *Union Bank v. Owen*, 4 Humph. (Tenn.), 338 (1843); *Bell v. Hull, etc. R'y*, 6 M. & W. 699 (1840); 1 *Greenleaf's Evidence*, § 429. He is competent though the transfer has not been registered. *Bank of Utica v. Smalley*, 2 Cow. 770 (1824); *Gilbert v. Manchester, etc. Co.*, 11 Wend. 627 (1834); *Delaware, etc. R. R. v. Irick*, 23 N. J. L. 321 (1852); and although he expects to buy it back; but there must be no agreement expressly to

serve as a judge¹ or juror² in a case where the corporation is a party. A stockholder cannot bring suit to enforce the ordinary claims of the corporation.³ The directors control such matters and decide whether a suit shall be brought, prosecuted or com-

that effect. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296 (1829); *Stall v. Catskill Bank*, 18 Wend. 466 (1837). *Contra*, *Carver v. Braintree Mfg. Co.*, 2 Story, 432 (1843); S. C., 5 Fed. Cas. 235.

¹*Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759 (1852), where the lord chancellor was a stockholder in the defendant company, and had affirmed a decree by the vice-chancellor in the case. The House of Lords reversed the decision on this ground. *Cooley*, Const. Lim., pp. *410, *411; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. 1 (1823), Chancellor Sandford therein refusing to follow Chancellor Kent in *Stuart v. Mechanics'*, etc. Bank, 19 Johns. 496, 501 (1822). In *Peninsular R'y v. Howard*, 20 Mich. 18 (1870), the court say: "It is not a matter of discretion with the judge or other person acting in a judicial capacity, nor is it left to his own sense of propriety or decency; but the principle forbids him to act in such capacity at all when he is thus interested, or when he may possibly be subject to this limitation." A judge is not incompetent by reason of the fact that he is a stockholder in a trust company that is guardian of a party whose sanity is being tried. *In re Leonard's Estate*, 95 Mich. 295 (1893). In New York the statute prevents an interested judge from sitting. See *Cregin v. Brooklyn*, etc. R. R., 19 Hun, 349 (1879). Being related to a stockholder does not disqualify. *Searsburgh Turnp. Co. v. Cutler*, 6 Vt. 315 (1834). A judge may hear a case although he is a cousin of one of the stockholders of one of the parties. *Robinson v. Southern Pac. Co.*, 105 Cal. 526 (1895).

A judge is not disqualified merely because he formerly owned stock. *Nicholson v. Showalter*, 83 Tex. 99 (1892). A judge who is a brother-in-law of a stockholder and president of a corporation is qualified to try a case in which the corporation is a party. *Lewis v. Hillsboro*, etc. Co., 23 S. W. Rep. 338 (Tex., 1893).

²*Page v. Contoocook Valley R. R.*, 21 N. H. 438 (1850); *Peninsular R. R. v. Howard*, 20 Mich. 18 (1870); *Fleeson v. Savage S. M. Co.*, 3 Nev. 157 (1867); *Silvis v. Ely*, 3 Watts & S. (Pa.) 420 (1842); *McLaughlin v. Louisville*, etc. Co., 37 S. W. Rep. 851 (Ky., 1896). *Cf.* *Williams v. Smith*, 6 Cow. 166 (1826). The incompetency extends to the son of a stockholder. *Georgia R. R. v. Hart*, 60 Ga. 550 (1878). A person donating to the railroad is incompetent to serve in condemnation proceedings. *Michigan Air Line R'y v. Barnes*, 40 Mich. 383 (1879). But the fact that the corporation is interested in a subsequent case on the same facts does not render the stockholder incompetent. *Commonwealth v. Boston*, etc. R. R., 57 Mass. 25 (1849).

Objection to competency must be raised at the trial. It cannot be raised for the first time by motion for new trial. *Williams v. Great Western R'y*, 3 H. & N. 869 (1858).

The fact that a juror and plaintiff are both stockholders in the same corporation is no cause for challenge in a suit not involving the corporation. *Brittain v. Allen*, 1 Dev. L. (N. C.) 120 (1829).

A juror is qualified although his wife is related to a stockholder. *Butler v. Glens Falls*, etc. R. R., 121 N. Y. 112 (1890).

³ See § 750.

promised.¹ Sometimes the stockholder is allowed to intervene in the suit, however,² and there are certain cases involving fraud on the part of the directors or *ultra vires* acts where the stockholder may sue in behalf of the corporation.³ A stockholder or director of an insolvent corporation is competent and qualified to act as its receiver or assignee.⁴ A director need not necessarily be a stockholder, unless a statute or the charter expressly so provides.⁵

In corporations having a capital stock no power of expulsion can be exercised unless expressly conferred by the charter or by statute.⁶ The expulsion by virtue of a by-law has been held to be unlawful.⁷ A member who has been unjustly expelled

¹ See § 750.

² See § 750.

³ See chs. XXXIX, XL and XLV.

⁴ *Covert v. Rogers*, 38 Mich. 363 (1878); *Re Eagle Iron Works*, 8 Paige, 385 (1840); modifying S. C., 3 Edw. Ch. 385 (1840); *Re Bowery Bank*, 16 How. Pr. 56 (1857). See also § 864, *infra*. Cf. *Attorney-General v. Bank of Columbia*, 1 Paige, 511 (1829), N. Y. Code Civ. Proc., § 2429, expressly authorizing such appointments.

In *Atkins v. Wabash, etc. R'y*, 29 Fed. Rep. 161 (1886), however, the court removed the receivers, and said: "Receivers should be impartial between the parties in interest; and stockholders and directors of insolvent corporations should not be appointed unless the case is exceptional and urgent; and then only on the consent of parties whose interests are to be intrusted to their charge." See also ch. LI, *infra*.

In New Jersey a corporate officer is held to be ineligible to the position of receiver. *Middlesex Freeholders v. State Bank*, 28 N. J. Eq. 166 (1877); *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217 (1878).

The court will not appoint as counsel for the receiver the counsel for the party who obtained the receivership. *Emmons v. Davis, etc. Co.*, 16 Atl. Rep. 157 (N. J., 1888).

⁵ *Wight v. Springfield, etc. R. R.*, 117 Mass. 226 (1875); *Re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, 541 (1882); *State v. McDaniel*, 22 Ohio St. 354 (1872). Cf. *Bartholomew v. Bentley*, 1 Ohio St. 37 (1852); *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 223 (1841); *Cumming v. Prescott*, 2 Younge & C. (Exch.) 488 (1837); *Stock's Case*, 33 L. J. (Ch.) 731 (1864).

⁶ *Evans v. Philadelphia Club*, 50 Pa. St. 107 (1865); *State v. Chamber of Commerce*, 20 Wis. 63 (1865); also *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670 (1879). In *Dickenson v. Milwaukee Chamber of Commerce*, 29 Wis. 45 (1871), it is held that there may be a lawful expulsion under a valid by-law. As to the expulsion of a member from the New York Stock Exchange, see *Belton v. Hatch*, 109 N. Y. 593 (1888). See also § 504, *infra*, note on Exchanges; also § 710.

⁷ *People v. Saint Franciscus Ben. Soc.*, 24 How. Pr. 216 (1862); *People v. Mechanics' Aid Soc.*, 22 Mich. 86 (1870); *Green v. African Meth. Epis. Soc.*, 1 Serg. & R. (Pa.) 254 (1815). A resolution spread upon the corporate records unjustly expelling a member is a libel, and the member offering the resolution is liable to an action thereupon. *Fawcett v. Charles*, 13 Wend. 473 (1835). Cf. *Adley v. Whit-*

may have *mandamus* to compel the corporation to restore him to membership.¹ Accordingly, where a corporate body strikes off the name of one of its members without giving him previous notice of their intention so to do, and affording him opportunity to be heard in his own defense, a *mandamus* to restore will be granted;² and an injunction lies to restrain a board of brokers from irregularly expelling one of their members.³ Such organizations, however, as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may sue for its dues instead of forfeiting the membership.⁴

Where the expulsion is regular and authorized by the charter or statute it is conclusive, and *mandamus* will not lie.⁵ An act of expulsion cannot be impeached or attacked collaterally.⁶ At common law there were three causes for expulsion: where the member was guilty of an infamous, indictable offense; or guilty of an offense against his duty as a corporator; or of an offense compounded of these two.⁷

stable Co., 19 Ves. Jr. 304 (1815); Chase v. East Tennessee, etc. R. R., 5 Lea (Tenn.), 415 (1880).

¹ Black, etc. Soc. v. Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth v. German Soc., 15 Pa. St. 251 (1850); People v. Saint Francis Ben. Soc., 24 How. Pr. 216 (1862); State v. Carteret Club, 40 N. J. L. 295 (1878); People v. Erie Medical Soc., 32 N. Y. 187 (1865); People v. New York Ben. Soc., 3 Hun, 361 (1875); Medical, etc. Soc. v. Weatherly, 75 Ala. 248 (1883). As to the damages to be paid to a member who has been unlawfully expelled and is reinstated by the court, see People v. Musical, etc. Union, 118 N. Y. 101 (1889).

² Delacy v. Neuse River Nav. Co., 1 Hawks (N. C.), 274 (1821). The member must have a fair hearing. Southern Plank-road Co. v. Hixon, 5 Ind. 165 (1854).

³ Leech v. Harris, 2 Brewst. (Pa.) 571 (1869); Hutchinson v. Lawrence (N. Y. Supr. Ct.), N. Y. D. Reg., Feb. 8,

1887. Cf. Italian Union Soc. v. Montedonico, 4 Am. & Eng. Corp. Cas. 22 (1884). But not as against a medical society. Gregg v. Massachusetts Medical Soc., 111 Mass. 185 (1872). So, also, the courts will not, upon the application of a member of the corporation, grant an injunction to restrain a corporation from initiating new members when no danger of pecuniary loss is shown as likely to result to the petitioner from such initiation. Thompson v. Tammany Soc., 17 Hun, 305 (1879).

⁴ Denver Chamber, etc. v. Green, 8 Colo. App. 420 (1896).

⁵ Commonwealth v. Pike Ben. Soc., 8 Watts & S. 247 (1844); People v. Fire Underwriters, 7 Hun, 248 (1876).

⁶ Black, etc. Soc. v. Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth v. Pike Ben. Soc., 8 Watts & S. (Pa.) 247 (1844); Society for Visitation, etc. v. Meyer, 52 Pa. St. 125, 131 (1866). Cf. Commonwealth v. Oliver, 2 Pars. Sel. Cas. 420, 426 (1849).

⁷ Baggs's Case, 11 Coke, 93b, 99 (1616);

§ 12. *Shares of stock defined — What law governs — Common stock — Preferred stock — Watered stock — Deferred stock — Overissued stock — Special stock.*— A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation.¹ By the court of appeals of New York it is said that “the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts.”²

Rex v. Liverpool, 2 Burr. 723, 732 (1759); *State v. Milwaukee Chamber of Commerce*, 20 Wis. 63 (1865); *People v. New York Comm. Assoc.*, 18 Abb. Pr. 271 (1864); *People v. Chicago Board of Trade*, 45 Ill. 112 (1867). Cf. *Smith v. Smith*, 3 Desauss. (S. C.) 557 (1813), where an expulsion for misconduct was sustained; *Woolsey v. Independent Order, etc.*, 1 Am. & Eng. Corp. Cas. 172 (1883); *Fisher v. Keane*, L. R. 11 Ch. D. 353 (1878); *Hopkinson v. Exeter*, L. R. 5 Eq. 63 (1867); *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615 (1881); *Gardner v. Fremantle*, 19 W. R. 256 (1871); *People v. New York Cotton Exch.*, 8 Hun, 216 (1876); *Dean v. Bennett*, L. R. 6 Ch. App. 489 (1871). In *Sturges v. Chicago Board of Trade*, 86 Ill. 441 (1877), it was held that the remedy of the expelled member was at law, and not in equity. But see *State v. Lusitanian, etc. Soc.*, 15 La. Ann. 73 (1860); *Wood v. Woad*, L. R. 9 Exch. 190 (1874); *Bostwick v. Detroit Fire Dept.*, 49 Mich. 513 (1883); *Hassler v. Philadelphia Musical Assoc.*, 14 Phila. 233 (1880); *Anacosta Tribe v. Murbach*, 13 Md. 91 (1858); *State v. Georgia Med. Soc.*, 38 Ga. 608 (1869); *Washington Ben. Soc. v. Bacher*, 20 Pa. St. 425 (1853); *Riddell v. Harmony Fire Co.*, 8 Phila. 310 (1871); *State v. Adams*, 44 Mo. 570 (1869); *Harmstead v. Washington Fire Co.*, 8 Phila. 331 (1871); *Common-*

wealth v. Philanthropic Soc., 5 Binn. (Pa.) 486 (1813); *Commonwealth v. St. Patrick Benev. Soc.*, 2 Binn. (Pa.) 448 (1810); *People v. Fire Underwriters*, 7 Hun, 248 (1876). Upon the general question of the power to expel members, see *Ang. & A., Corp.*, § 410 *et seq.*; 2 Kent, Com. 297.

¹ Quoted and approved in *Jones v. Concord, etc. R. R.*, 30 Atl. Rep. 614 (N. H., 1892), and in *American, etc. Co. v. State Board*, 56 N. J. L. 389 (1894); 24 N. Y. App. Div. 255.

² *Plimpton v. Bigelow*, 93 N. Y. 592, 599 (1883). To the same effect see *Burrall v. Bushwick R. R.*, 75 N. Y. 211, 216 (1878); *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159 (1879); *Jermain v. Lake Shore, etc. R. R.*, 91 N. Y. 483, 492 (1883); *Field v. Pierce*, 102 Mass. 253, 261 (1869); *Jones v. Davis*, 35 Ohio St. 474, 477 (1880); *Bradley v. Bauder*, 36 Ohio St. 23, 35 (1880); *Bent v. Hart*, 10 Mo. App. 143 (1881); *Harrison v. Vines*, 46 Tex. 15, 21 (1876); *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196 (1836); *Barksdale v. Finney*, 14 Gratt. (Va.) 338, 357 (1858); *Van Allen v. Assessors*, 3 Wall. 573, 584 (1865); *Union Nat. Bank v. Byram*, 131 Ill. 92 (1889).

“The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its

It is said that the rights which a share of stock secures to its owner are the rights "to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose."¹

In England a share means the same as it does in this country; but the word "stock" there signifies a number of paid-up shares, so united that the owner may divide it and transfer it in large or small quantities, irrespective of the number and par value of the shares which have been thus merged into "stock."²

Hence a share of stock may be defined as a proportional part

charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts." *Gibbons v. Mahon*, 136 U. S. 549 (1890).

Chief Justice Shaw, by way of a definition of a share of stock, says: "The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation." *Fisher v. Essex Bank*, 71 Mass. 373, 378 (1855). *Cf. Arnold v. Ruggles*, 1 R. I. 165 (1837).

¹ *Forbes v. Memphis, etc. R. R.*, 2 Woods, 323, 331 (1872); S. C., 9 Fed. Cas. 408. *Cf. Payne v. Elliot*, 54 Cal. 339 (1880). Mr. Justice Sharswood says: "A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation,—with the right to receive, in the mean time, such profits as may be made and declared in the shape of divi-

dends." *Neiler v. Kelley*, 69 Pa. St. 403, 407 (1871). See also *Bridgman v. Keokuk*, 72 Iowa, 42 (1887).

² *Morrice v. Aylmer*, L. R. 7 H. L. 717 (1875), says: "Shares are not necessarily converted into stock as soon as they are paid up; they may exist either as paid up or as not paid-up shares. But, as regards stock, that can only exist in the paid-up state. . . . There is a certain extent of change, as well as consolidation, in these paid-up shares. They are changed from ordinary shares in this respect, that they are no longer incapable of being subdivided."

Stock is "a fund or capital which is capable of being divided into and held in any irregular amount. Thus, the ordinary government funds (consols, new threes, etc.) are called 'stocks,' because a person can buy them in any amount (such as £99 19s. 11d. as well as £100). A share or debenture, on the other hand, is of a fixed amount (such as £10, £50, £100), and is incapable of subdivision or consolidation." *Rapalje & L. Law Dict.* 1224. Shares may be converted by the company into stock, so as to enable their holders to dispose of them in small or irregular amounts. *Hurrell & Hyde, Joint-Stock Companies*, 47.

of certain rights in the management and profits of the corporation during its existence, and in the assets upon dissolution.¹

It has been well settled that shares of stock are personalty and not realty. A share of stock is not real estate, has nothing to give it the character of real estate, is not land, nor an hereditament, nor an interest in either of them.²

In some of the earlier cases, upon the theory, perhaps, that the shareholders had a direct interest in the tangible property of the corporation, shares were held to be real estate where the corporate property consisted wholly or chiefly of realty.³

But as a result of all the authorities it is clearly settled that shares of stock are to be regarded as personalty,⁴ a view which has frequently found expression in declaratory statutes both in England⁵ and the various states of the Union.

¹ *Oakbank Oil Co. v. Crum*, L. R. 8 App. Cas. 65 (1882).

² *Bligh v. Brent*, 2 *Younge & C.* (Exch.) 268 (1837); *Edwards v. Hall*, 6 De G., M. & G. 74 (1855); *Bradley v. Holdsworth*, 3 M. & W. 422 (1838); *Ex parte Lancaster Canal Nav. Co.*, 1 Dea. & Ch. 411 (1832); *Watson v. Spratley*, 28 Eng. L. & Eq. 507 (1854). In *Allen v. Pegram*, 16 Iowa, 163, 173 (1864), Mr. Justice Dillon says: "Mr. Williams treats of shares in corporations as 'incorporeal, personal property'—a very neat and accurate designation. Wms. Pers. Prop. [*191]." See also *Johns v. Johns*, 1 Ohio St. 350 (1853), *Thurman, J.*; *Arnold v. Ruggles*, 1 R. L. 165 (1837); *Dyer v. Osborne*, 11 R. L. 321, 325 (1876); *Tipets v. Walker*, 4 Mass. 595, 596 (1808), *Parsons, C. J.*; *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829); *Weyer v. Second Nat. Bank*, 57 Ind. 198 (1877); *Manns v. Brookville Nat. Bank*, 73 Ind. 243 (1881); *Seward v. Rising Sun*, 79 Ind. 351 (1881); *Southwestern R. R. v. Thomason*, 40 Ga. 408 (1869). *Cf.* *Wheelock v. Moulton*, 15 Vt. 519 (1843); *Russell v. Temple* (Mass., 1798), 3 Dane, Abr., 108, 110.

³ *Price v. Price*, 6 Dana (Ky.), 107 (1838); *Copeland v. Copeland*, 7 Bush,

349 (1870). But as soon as this latter decision was handed down, the legislature passed an act declaring shares of stock in Kentucky to be personal property; thus bringing the courts of that state into line with other common-law courts upon this question. In *Meason's Estate*, 4 Watts (Pa.), 341 (1835), there is to be found a tendency to hold shares in a toll-bridge, real estate. Turnpike stock was held realty in *Welles v. Cowles*, 2 Conn. 567 (1818); *S. P., Knapp v. Williams*, 4 Ves. Jr. 430, note (1798). So of canal shares. *Tomlinson v. Tomlinson*, 9 Beav. 459 (1823). *Cf.* *Buckeridge v. Ingram*, 2 Ves. Jr. 652 (1795); *Drybutter v. Bartholomew*, 2 P. Wms. 127 (1723); *Rex v. Winstanley*, 8 Price, 180 (1820). *Contra*, *Walker v. Milne*, 11 Beav. 507 (1849). See, also, *Sparling v. Parker*, 9 Beav. 450 (1846); *Myers v. Perrigal*, 18 L. J. (Ch.) 185 (1849); *S. C.*, 21 L. J. (C. P.) 217 (1852); *Ashton v. Langdale*, 4 Eng. L. & Eq. 80 (1851), and an interesting discussion of the question in 3 Dane, Abr. 108 et seq.

⁴ See cases cited *supra*. Also, an essay on Stock, its Nature and Transfer, 7 South. L. Rev. (N. S.) 430 (1881).

⁵ 41 Geo. III, ch. 3; *Watson v. Sprat-*

Stock, though personalty, is not a chattel;¹ it is rather a chose in action; or, as some older authorities declare, property in the nature of a chose in action.²

It is, moreover, of such a nature that it cannot ordinarily, either by act of the law or act of its owner, be taken into tangible possession, although, of course, its representative — the certificate of stock — may be.³

It is an English doctrine that shares of stock are not “goods, wares or merchandise,” as those terms are to be understood in construing that section of the statute of frauds which requires delivery, payment or memorandum in writing of a sale thereof.⁴ In this country, however, the courts have taken the opposite view.⁵ Furthermore, it is said that shares are not money,⁶ nor are they security for money,⁷ nor a credit.⁸

Shares of stock, being in the nature of a chose in action, are, at common law, not subject to attachment or levy of execution;⁹ but most of the states have enacted statutes which have changed this rule. This species of property may be made subject to taxation;¹⁰ and for purposes of taxation it exists apart

ley, 28 Eng. L. & Eq. 507 (1854); *Ex parte* Vallance, 2 Deacon, 354 (1837); *Ex parte* Lancaster Canal Nav. Co., 1 Dea. & Ch. 411 (1832).

¹ *Rex v. Capper*, 5 Price (Exch.), 217 (1817).

² *Wildman v. Wildman*, 9 Ves. 174 (1803); *Howe v. Starkweather*, 17 Mass. 240, 243 (1821); *Hutchins v. State Bank*, 53 Mass. 421, 426 (1847); *Union Bank v. State*, 9 Yerg. (Tenn.) 490, 500 (1836); *Allen v. Pegram*, 16 Iowa, 163, 173 (1864); *Arnold v. Ruggles*, 1 R. I. 165 (1837); *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373 (1849); *Denton v. Livingston*, 9 Johns. 96 (1812); *Chesapeake, etc. R. R. v. Paine*, 29 Gratt. (Va.) 502, 506 (1877); *Barksdale v. Finney*, 14 Gratt. (Va.) 338, 357 (1858); *Fisher v. Essex Bank*, 71 Mass. 373, 377 (1855); *People's Bank v. Kurtz*, 99 Pa. St. 344, 349 (1882); *Humble v. Mitchell*, 11 Ad. & El. 205, 208 (1839). *Cf. Kellogg v. Stockwell*, 75 Ill. 68 (1874); *In re Jackson*, L. R. 12 Eq. 354 (1871). See also 78 L. T. Rep. 61 (1897).

³ *Jermain v. Lake Shore, etc. R. R.*, 91 N. Y. 483, 492 (1883); *Neiler v. Kelley*, 69 Pa. St. 403, 407 (1871); *Payne v. Elliot*, 54 Cal. 339, 341 (1880).

⁴ See §§ 339, 340, *infra*.

⁵ *Id.*

⁶ *Nightingal v. Devisme*, 5 Burr. 2589; S. C., 2 W. Bl. 684 (1770); *Jones v. Brinley*, 1 East, 1 (1800); *Douglas v. Congreve*, 1 Keen, 410 (1836); *Gosden v. Dotterill*, 1 My. & K. 56 (1832); *Lowe v. Thomas*, 5 De G., M. & G. 315 (1854); *Hotham v. Sutton*, 15 Ves. 319 (1808).

⁷ *Ogle v. Knipe*, 38 L. J. (Ch.) 692 (1869); *Atkins v. Gamble*, 42 Cal. 86 (1871); *Wilson v. Little*, 2 N. Y. 443 (1849); *Mechanics' Bank v. New York, etc. R. R.*, 13 N. Y. 599, 626 (1856).

⁸ *New Orleans, etc. Assoc. v. Wiltz*, 10 Fed. Rep. 330 (1881); S. C., 4 Woods, 43. See also *Smith v. Crescent City, etc. Co.*, 30 La. Ann. 1378 (1878).

⁹ See ch. XXVII.

¹⁰ See ch. XXXIV.

from the corporation, the corporate property, the corporate franchises and the capital stock. Stock is "issued," so far as taxation is concerned, when it is subscribed for.¹ In most of the states, and in the federal courts, trover lies for the conversion of stock. In Pennsylvania, however, a contrary rule prevails, although conversion is held to lie in reference to certificates of stock.²

Justice Story, in his *Conflict of Laws*, says that questions relating to shares of stock are to be determined by the law of the state of the corporation.³ For purposes of attachment and execution levied upon stock this is undoubtedly true, since it is only at the domicile of the corporation that such an attachment or execution can be levied.⁴ As regards the taxation of stock, however, the stock follows the domicile of the stockholder, and may be taxed in accordance with the law of the domicile of such stockholder.⁵ In reference to transfers of stock it would seem that the law of the forum or of the place of making or the place of performing the contract should govern as between the parties to the contract, but as to the duty of the corporation relative to transfers, the law of the state wherein the corporation was organized should govern.⁶ Legal proceedings against the stock may be initiated at the domicile of the corporation.⁷ A claimant, however, of stock in a corporation cannot institute suit at the place where the company is

¹ *American, etc. Co. v. State Board*, 56 N. J. L. 389 (1894).

² See ch. XXXV.

³ Story, *Conf. Laws* (8th ed.), § 383. And see the discussion of this subject in *Black v. Zacharie*, 3 How. 483 (1845). As to the *situs* of stock see article in 45 Alb. L. J. 330; *Glenn v. Garth*, 147 U. S. 360 (1892); *Glenn v. Liggett*, 135 U. S. 533 (1890); *Morris v. Glenn*, 87 Ala. 628 (1888); also *Lowndes v. Gooch*, 39 Atl. Rep. 1045 (Md., 1898); *Atty. Gen. v. New York, etc. Co.*, 78 L. T. Rep. 61 (1897).

⁴ See ch. XXVII.

⁵ See ch. XXXIV. The case of *Glenn v. Clabaugh*, 65 Md. 65 (1886), holds that the insolvent laws of Maryland cannot discharge a Mary-

land subscriber to a Virginia corporation. See 78 L. T. Rep. 61.

⁶ See ch. XXII.

⁷ See ch. XXVII, and §§ 361, 362, *infra*; and, in general, see *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487 (1833); *Black v. Zacharie*, 3 How. 483 (1845); *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874). As regards national banks, see *Scott v. Pequonnock Nat. Bank*, 15 Fed. Rep. 494 (1883); *Continental Nat. Bank v. Eliot Nat. Bank*, 12 Rep. 351 (1881); *S. C.*, 7 Fed. Rep. 369; *Dickinson v. Central Nat. Bank*, 129 Mass. 279 (1880); *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515 (1882); *State v. First Nat. Bank*, 89 Ind. 302 (1883).

incorporated for the purpose of obtaining possession of the stock where the holders of the stock are non-residents and are brought into the case only by publication and substituted service. The court does not acquire jurisdiction over the defendants,¹ unless the certificates are within the jurisdiction.²

In regard to shares of stock owned by married women, the payment of dividends is governed by the law of the domicile of the corporation.³ It would seem that as to transfers of stock by her the law of her domicile should govern as between her and the party with whom she deals, but that the duty of the corporation as to transfers is according to the law of the state wherein the corporation is organized.⁴

A guardian's sale of stock is governed by the law of the state of the guardianship,⁵ so far as the party dealing with the guardian is concerned, but as to the corporation the same rule should apply as in the case of transfers by married women.

As regards the common-law and statutory liability of a stockholder on his stock, the law of the domicile of the corporation determines the extent of the liability, while the law of the *forum* determines the method of enforcing that liability.⁶

The capital stock of a corporation may be either common or preferred. By *common stock* is meant that stock which entitles the owners of it to an equal *pro rata* division of profits, if any there be; one shareholder or class of shareholders having no advantage, priority or preference over any other shareholder or class of shareholders in the division. By *preferred stock* is meant stock which entitles its owners to dividends out of the net profits before or in preference to the holders of the common stock. Common stock entitles the owner to a *pro rata* of dividends equally with all other holders of the stock except preferred stockholders; while preferred stock entitles the owner to a priority in dividends.

By *watered stock* is meant stock which is issued as fully paid up, when, in fact, the whole amount of the par value thereof

¹ Jellenik v. Huron, etc. Co., 82 Fed. Rep. 778 (1897). A careful discussion of the *situs* of stock will be found in the case of Matter of Bronson, 150 N. Y. 1, 17, 24 (1896).

² See § 361, *infra*.

³ See § 542, *infra*.

⁴ See on this subject Story on Conflict of Laws, 8th ed., §§ 146, etc., and §§ 423, 159 and 186. See also § 319, *infra*.

⁵ See § 328, *infra*.

⁶ See ch. XI, § 199, and ch. XII, § 223.

has not been paid in. If an amount less than the whole face value of the stock has been paid, and the stock has been issued as full paid, then the stock is watered to the extent of the deficit. Watered stock is, accordingly, stock which purports to represent, but does not represent, in good faith, money paid in to the treasury of the company, or money's worth actually contributed to the working capital of the concern. The issue of such stock may be lawful, but sometimes it is in fraud of the rights of some interested party, as, *e. g.*, creditors of the corporation, certain shareholders or classes of shareholders.¹

By *deferred stock* or *bonds* is meant stock or bonds the payment of dividends or *interest* upon which is expressly postponed until some other class of shareholders are paid a dividend, or until some certain obligation or liability of the corporation is satisfied.²

By *overissued* or *spurious stock* is meant stock issued in excess of the full amount of capital stock authorized by the charter of the corporation.³ Such stock is void even though issued in good faith.

In Massachusetts some classes of corporations issue what is there known as *special stock*. This is a peculiar kind of stock, essentially local in character, provided for by statute, and unknown before the year 1855. Its characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be specified in the certificate; the corporation is bound to pay a fixed half-yearly sum or dividend upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond the amount of their stock, and the issue of special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.⁴

§ 13. *Certificates of stock*.—A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate

¹ See ch. III.

² See § 762, *infra*, and ch. III.

³ See §§ 291, 298.

⁴ See ch. XVI, *infra*.

property and franchises;¹ it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights.² It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares.³ Accordingly it follows that shares have no "ear-marks" — that one share cannot be distinguished from another share — but that it is only the certificates which are distinguishable one from the other by their numbers and in other ways.⁴ The certificate, therefore, has value in itself only as evidence, and, apart from the shares which it represents, it is utterly worthless.⁵ And even as evidence it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it.⁶ One element of its value to the shareholder is

¹ *Higgins v. Lansingh*, 154 Ill. 301 (1895).

An American form of a certificate of stock is so common it need not be given here. The English form is different. The following is a specimen: No. 2007. 1000 fully paid ordinary shares.

The ——— Company, Limited.

Incorporated under the Companies Acts, 1862 to 1890.

CAPITAL, £200,000.

Divided into

112,000 seven per cent. preference shares of £1 each, 80,000 ordinary shares of £1 each and 400 founders' shares of £20 each.

THIS IS TO CERTIFY that ——— of ——— street, London, E. C., is the Registered Holder of One Thousand Ordinary Shares of £1 each, Nos. 113,751 to 114,750, inclusive, in the ——— Company, Limited, subject to the Regulations of the said Company, and that the said Shares are fully paid up.

GIVEN under the Common Seal of the Company this ——— day of ———, 189—.

(Seal.)

———, Secretary.

No transfer of all or any portion of these shares can be registered without the production of this certificate.

² Approved in the case of *Nelson v. Owen*, 21 So. Rep. 75 (Ala., 1896).

³ *Hawley v. Brumagim*, 33 Cal. 394 (1867); *Campbell v. Morgan*, 4 Bradw.

(Ill.) 100 (1879); *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882); *Hubbell v. Drexel*, 11 Fed. Rep. 115 (1882); *Van Allen v. Assessors*, 3 Wall. 573, 598 (1865); *Burr v. Wilcox*, 22 N. Y. 551 (1860); *Birmingham Nat. Bank v. Roden*, 97 Ala. 404 (1892). "Stock is one thing, and certificates another. The former is the substance, and the latter is the evidence of it." *Hawley v. Brumagim*, 33 Cal. 394 (1867). The fact that certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state. *Re James*, 144 N. Y. 6 (1894).

⁴ *Hubbell v. Drexel*, 11 Fed. Rep. 115 (1882).

⁵ *Payne v. Elliot*, 54 Cal. 339 (1880).

"But in the business world such obligations or securities are treated as something more than mere muni-ments of title. They are daily bought and sold like ordinary chattels, they may be hypothecated or pledged, they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property." *Merritt v. American, etc. Co.*, 79 Fed. Rep. 228, 235 (1897).

⁶ *Johnson v. Albany, etc. R. R.*, 40

that it is *prima facie* evidence of his title.¹ A certificate of stock need not be under seal.²

A certificate of stock is not necessary to the complete ownership of the stock;³ nor is payment of the subscription necessary thereto.⁴ But the corporation is bound, upon demand, to issue a certificate of stock to one who is entitled to it;⁵ and, if it refuses, the stockholder may bring suit in equity to compel its issuance;⁶ or he may sue it in an action at law for damages.⁷ When certificates are executed by a part only of the

How. Pr. 193 (1870). Cf. *Arnold v. Suffolk Bank*, 27 Barb. 424 (1857), a case in which the distinction between a refusal on the part of a corporation to issue a certificate in a certain form and a refusal to recognize the owner of shares as owner — a denial of his property in the stock — is clearly drawn. The supreme court of Indiana have noted the distinction to the effect that a certificate is not the title, but only evidence of the title, to shares. The court say: "The certificate did not constitute the title to the stock. . . . In legal contemplation the certificate was merely an additional and convenient evidence of the ownership of the stock." *Cincinnati, etc. R. R. v. Pearce*, 28 Ind. 502 (1867).

¹ *Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); *Courtright v. Deeds*, 37 Iowa, 503 (1873); *Walker v. Detroit Transit R'y*, 47 Mich. 338 (1882).

² *Halstead v. Dodge*, 51 N. Y. Super. Ct. 169 (1884). There is no common-law rule requiring certificates of stock to have the corporate seal placed upon them. *Coddington v. Railroad*, 103 U. S. 409 (1880), *dictum*.

If the certificate is not signed by the president and is not under seal, a purchaser must take notice of facts contained in the corporate books relative to such stock. *Byers v. Rollins*, 13 Colo. 22 (1889).

³ *Wheeler v. Millar*, 90 N. Y. 353

(1882); *Burr v. Wilcox*, 22 N. Y. 551, 555 (1860); *Thorp v. Woodhull*, 1 Sandf. Ch. 411 (1844).

⁴ *Wheeler v. Millar*, 90 N. Y. 353 (1882).

⁵ *Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336, 347 (1856); *National Bank v. Watsonstown Bank*, 105 U. S. 217 (1881). A valid certificate may be issued out of the state in which the corporation exists. *Courtright v. Deeds*, 37 Iowa, 503 (1873). See § 61.

The failure of the corporation to issue a certificate is no defense to an action to collect the subscription. See § 192, *infra*.

As to whether a company is obliged at common law to issue certificates of stock, see an article in 6 *Juridical Review* (Eng.), 58.

It has been held in Maryland that a subscriber to the increased capital stock of the company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893).

⁶ *Id.*

⁷ *Id.*

officers required by law to sign them, they may be void.¹ But a certificate issued to an officer of the corporation who is a shareholder, although the certificate is signed by that officer, is valid.² It is not, however, essential to the existence of the corporation that certificates of stock shall be issued.³ Without a certificate the shareholder has a complete power to transfer his stock,⁴ to receive dividends,⁵ and to vote,⁶ and he is individually liable as a stockholder.⁷ A certificate of stock may be a valid subject of a *donatio causa mortis*, of a legacy, a contract of sale, a pledge, or a gift.⁸ Under the English statute an issue of stock by a corporation has reference only to the issue of the certificates, and means an original putting out of the shares.⁹ In New York, making out and mailing the certificates has been held to constitute a due issuing thereof.¹⁰ And in Maryland, the stub of a book from which certificates have been detached is evidence of their regular issue.¹¹

Certificates of stock are not negotiable instruments. They have sometimes been said to have a quasi-negotiability, but this phraseology throws little light upon the real character of the transferability of stock. It may be said in general that by the operation of the law of estoppel the purchaser of a certificate of stock, in good faith and for value, may take it free from many claims of previous holders which would be allowed to come in, in the case of a sale of an ordinary chose in action.¹²

By reason of certificates of stock having many elements of negotiability a pledge of the certificates may be enforced by suit in a state where the certificates are deposited.¹³

¹ *Holbrook v. Fauquier, etc. Co.*, 3 Cranch, C. C. 425 (1829); S. C., 12 Fed. Cas. 322. See § 363.

² *Titus v. Great Western Turnp. Road*, 61 N. Y. 237 (1874).

³ *Chester Glass Co. v. Dewey*, 16 Mass. 94 (1819); *Burr v. Wilcox*, 22 N. Y. 551 (1860).

⁴ *First Nat. Bank v. Gifford*, 47 Iowa, 575 (1877); *National Bank v. Watsontown Bank*, 105 U. S. 217 (1881). Cf. *Brigham v. Mead*, 92 Mass. 245 (1865).

⁵ *Ellis v. Essex Merrimack Bridge*, 19 Mass. 243 (1824).

⁶ *Beckett v. Houston*, 32 Ind. 393 (1869).

⁷ *Agricultural Bank v. Wilson*, 24 Me. 273 (1844); *Mitchell v. Beckman*, 64 Cal. 117 (1883).

⁸ See ch. XVIII.

⁹ *East Gloucestershire R'y v. Bartholomew*, L. R. 3 Exch. 15 (1867); *Bush's Case*, L. R. 9 Ch. App. 554 (1874).

¹⁰ *Jones v. Terre Haute, etc. R. R.*, 17 How. Pr. 529 (1859). Cf. § 12, *supra*.

¹¹ *Weber v. Fickey*, 47 Md. 196 (1877).

¹² See ch. XXIV.

¹³ Certificates of stock represent the

Stock may be transferred without a transfer of the certificate, and if the transferrer afterwards transfers the certificate to another party he is liable to the first transferee.¹

§ 14. *Definition of bond, mortgage, deed of trust, debenture, articles of association, memoranda of association, scrip, certificate book, transfer book, stock ledger, underwriting, founders' shares.*—A *bond* of a corporation is an instrument executed under the seal of the corporation, acknowledging the loan and agreeing to repay the same upon terms set forth therein. A coupon bond is one that has coupons attached, usually in the form of promissory notes to pay an amount of money equal to the annual or semi-annual interest on the bond. A registered bond is one whose negotiability is temporarily withdrawn by a writing on the bond that it belongs to a specified person, and by a registry to that effect at an office specified by the company.

A *mortgage* given by a corporation may be similar to the ordinary mortgage given by an individual.

But usually a corporate mortgage is made in the form of a *mortgage deed of trust*. Such a deed of trust is a mortgage, the mortgagee, however, being a trustee for bondholders, and the bonds being secured by the mortgage deed of trust. The trustee may be an individual but generally is a trust company. Where the mortgage is to secure a large number of bonds, it is almost necessary that a deed of trust be used. Otherwise the mortgage would run to the bondholders, who are constantly changing, and many of whom are soon unknown to the corporation mortgagor. Moreover in foreclosing such a mortgage serious difficulties would arise. Hence, where a corporation gives a mortgage to secure bonds, this mortgage is made in the form of a deed of trust.

The word "*debenture*" has no definite legal meaning, except that it always means a debt. It may be applied to any promise or security of the company to pay money. It may be a mere promise to pay, or a covenant under seal to pay, or a mortgage or charge under the seal of the company.²

stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing a lien, even though the corporation is located in another state. *Merritt v. American, etc. Co.*, 79 Fed. Rep. 228 (1897).

¹ *Mahaney v. Walsh*, 16 N. Y. App. Div. 601 (1897). See § 358, *infra*.

² See § 776, *infra*.

"*Debenture stock*" is an English term. It does not mean shares of stock, as in America, but means an English bond, an absolute obligation of the corporation to pay principal and interest at fixed times. It is the English form of bond, and may or may not be secured by a mortgage. A holder of debenture stock is generally given a certificate by the corporation, similar in many respects to a certificate of shares of stock, except that the former represents a portion of a lump debt, while the latter represents a portion of the capital stock.¹ In this country the same kind of security is issued by giving to a bondholder, in exchange for coupon bonds which he delivers to the company at the time when he receives the certificate, a certificate entitling him, and him alone, to a specified sum and interest. The United States government issues such a certificate and calls it a registered bond. An American mortgage may be so drawn as to secure both American bonds and English debenture stock, with suitable provisions for the exchange of bonds for stock.²

Articles of association are similar to by-laws, and are for the regulation and management of the corporation.

Memoranda of association are the same as the American articles of incorporation required to be filed under general statutes for incorporation.³

In England *scrip* is a written acknowledgment by a corporation that the holder will be entitled to certain shares of stock

¹Lindley, Company Law, p. 195. See also § 777, *infra*. "Debenture stock is of the same nature as ordinary debentures, except that instead of each bond securing a definite amount the whole sum secured is treated as a single stock, and bonds are issued declaring the holder to be entitled to a definite sum, part of this stock. This sum is not necessarily a round sum, but may be for any number of pounds, and may include fractions of a pound unless express limitation is made in that respect. The debenture stock may be repayable at a fixed date, or may be irredeemable, according to the deed creating it, and may be secured in any manner in

which a debenture may be secured. The loans of the large railway companies are almost invariably in the form of stock, and are usually perpetual." Jordan & Brown on Joint-Stock Companies (20th ed.), p. 138.

²See § 777, *infra*.

³"Deed of settlement" is a term that was used in England, prior to 1862, to indicate the same as the modern articles of association and memoranda of association. See *Burrows v. Smith*, 10 N. Y. 550, 556 (1853); *Rapalje & L. Law Dict.* 361; *London Financial Assoc. v. Kelk*, L. R. 26 Ch. D. 107 (1884); *Guinness v. Land Corporation*, L. R. 22 Ch. D. 349 (1882).

and a certificate therefor when the unpaid instalments on such shares are all paid in. They are negotiable instruments.¹

The *certificate book* of a corporation contains the printed, lithographed or engraved certificates of stock, which are filled out and signed by the proper officers and then delivered to the stockholders. A stub in the book, opposite each certificate, states the name, amount, date, etc., of the certificate which is issued. When the certificate is returned, upon a transfer to a new person, it is canceled and attached to the old stub. On the back of the certificate a blank form for a transfer of the stock represented by it is given.

The *transfer book* is for the purpose of keeping a record of transfers of stock. The entries in it correspond to the transfers on the backs of the canceled certificates of stock. The entries in the transfer book are generally made by a clerk as attorney in fact for the transferrer. The form of transfer on the back of the certificate contains such a power of attorney.

The *stock ledger* contains a statement of how much stock the past and present stockholders have owned or now own.²

Underwriting means an agreement, made before the shares are brought before the public, that in the event of the public

¹Goodwin v. Robarts, L. R. 1 App. Cas. 476 (1876); Rumball v. Metropolitan Bank, L. R. 2 Q. B. D. 194 (1877).

In this country scrip generally means a kind of dividend: *e. g.*, land scrip dividend entitling the holder to take so much land; and a scrip dividend entitling the holder to future dividends the same as stock receives, but without the voting privilege of stock. See ch. XXXII, *infra*.

²"The keeping of a stock book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments

and delinquent sales, whether his shares are free from liens or liability in favor of the corporation, and in the same manner enables the corporation to enforce its delinquent assessment upon the shares liable therefor, no matter how many transfers have been made subsequent to the assessment; each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens." Craig v. Hesperia, etc. Co., 113 Cal. 7 (1896). See also § 382, *infra*. It may be added that the stock ledger also enables the corporation to ascertain quickly who is entitled to vote and on how much stock; also who is entitled to dividends and on how much stock. It is not necessary for the corporation to keep either a transfer or a stock ledger. See § 382, *infra*.

not taking all the shares or the number mentioned in the agreement, the underwriter will take the shares which the public do not take.¹

Founders' shares are shares which take the profits after certain dividends are paid on the other shares. They are a sort of deferred stock.² They are issued to the founders or promoters of the enterprise. They are unknown in America. In England they often acquire a great value, and so enormous have been the profits of some of the trust and investment companies that their founders' shares, which divide the surplus after payment of a moderate maximum dividend on the ordinary shares, are worth almost fabulous sums of money.³

¹The underwriter is liable on the stock. *Re Licensed Victuallers*, etc. Assoc., L. R. 42 Ch. D. 1 (1889).

Where an "underwriter" agrees to subscribe for whatever the public do not take, and authorizes another to make the subscription for him, he is bound by the subscription. *Shaw v. Bentley*, etc. Co., 68 L. T. Rep. 812 (1893); also *Re Bentley*, etc. Co., 69 L. T. Rep. 204 (1893).

An underwriter's contract is given in full in *Re Hannan*, etc. Co., 75 L. T. Rep. 45 (1896).

²In the case *Re New Transvaal Co.*, 75 L. T. Rep. 272 (1896), the founders' shares had the following rights:

"The profits of the company in each year shall . . . be applicable first in or towards payment of a dividend of eight per cent. on the amount of the ordinary shares, and the surplus, if any, shall . . . be divided as follows, viz.: one-fifth part thereof among the holders of founders' shares, and four-fifths thereof among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon."

In *Re London*, etc., Ltd., 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of £10 each and twelve thousand ordinary shares of £10 each. The found-

ers' shares were entitled to half of any dividend which might remain after paying ten per cent. on the ordinary shares. The directors allotted to themselves eighty of these founders' shares and the court upheld the allotment. The prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others.

³For instance, the founders' shares in *The Trustees, Executors and Securities Insurance Company* have been quoted on the market at something like seven thousand five hundred per cent. of their par value.

The following article in the *Financial News* of London of June 2, 1890, is interesting if not particularly edifying:

"In a considerable proportion of the new enterprises which are being brought out, either the prospectus is accompanied by a list of founders, or it invites subscriptions of ordinary capital by offering the inducement of a proportionate allotment of founders' shares. The very name of founder has come to have an opulent ring about it, . . . and in the case of the most recent issue, that of the *Empire of India Corporation*, the fortunate possessors of the few £10 founders' shares have already seen them worked up in the market to a premium of £500. No wonder, then, that securi-

Founders' shares are often given as a gift to eminent persons who consent to act as directors and to be held out to the public as such.

ties of this class are regarded with a covetous eye. To be the lucky holder seems a very good substitute for possessing the philosopher's stone or the magic wand of the eastern genii, by means of which gold could be produced at will. In no other kind of investment regulated by limited-liability principles have such profitable results been obtained. For a comparatively small outlay there is the prospect of a return 'exceeding the dreams of avarice,' and although all founders' shares do not turn out *El Dorados*, yet their infinite possibilities of 'unearned increment' give them a special degree of fascination, and tempt persons who would scornfully hold aloof from any ordinary scheme of company promotion to lend their names in return for the allotment of one or two founders' shares. . . . There can be no question that the investing public attach a good deal of importance to the lists of founders. They see a number of names of gentlemen of social position, possibly of financial eminence, and they jump to the conclusion that the taking up of the founders' shares by these persons implies a sort of assurance on their part of the respectability and *bona fides* of the promotion. The founders themselves, probably, have never looked at the matter quite in that light. They must, however, confess that the privilege of holding these specially-favored shares is not conferred with an altogether disinterested object. Promoters want to get good names on the prospectus, and this is one of the expedients by which they accomplish their end. . . . It is quite understood in many — perhaps in a majority of — cases that it is their personal influence which is being purchased by the grant of an exclusive privilege. To that extent they do undoubtedly further and encourage the interests of the promoters. Sometimes they undertake for each founders' share to place a certain number of ordinary shares — in other words, to 'guarantee a subscription.' "

Founders' shares resemble preferred stock in that the amount of dividends payable thereon depends in each case upon the terms of the agreement under which the shares are issued. The dividends going to the founders' shares may be great or small, and may be more or less fixed or contingent, just as the original

incorporators may determine. The nature of founders' shares and the variable character of the rights conferred thereby are illustrated in the case *Re London, etc. Corp.*, 73 L. T. Rep. 280 (1895), the charter containing the following provisions:

"(b) There shall first be paid out of the net profits of the company in each year to the holders of the preferred shares a cumulative preferential dividend, at a rate not exceeding 25 per cent. per annum on the amount paid up thereon for the time being. (c) There shall, in the next place, be paid out of the net profits of the company to the holders of ordinary shares a dividend at the rate of seven per cent. per annum on the amount paid up thereon for the time being. (d) After these payments, and providing for the further remuneration of the directors, one moiety shall belong to the holders of founders' shares, and the residue shall belong to the holders of ordinary shares." . . .

"The founders' shares shall entitle the holders thereof to such dividends and other interest in the profits of the company as is defined by the memorandum and articles of association; but, except in the case of liquidation, they shall not entitle the holders thereof to any share in the capital of the company beyond the actual amount paid up or duly credited as paid up upon them." . . .

"In any winding-up of the company the holders of founders' shares shall be entitled (as between themselves and holders of preferred and ordinary shares) to one moiety of any assets of the company remaining after the payment and discharge of the debts and liabilities of the company, and the repayment to the holders of preferred and ordinary shares of the amount paid up or credited as paid up on such shares, together with the costs of winding up; provided always that in the division of any reserve fund under this clause the founders shall be entitled to one moiety of any portion of such reserve fund arising from the issue of any shares in the company at a premium, but as to any other reserve fund shall only be entitled to one moiety of such reserve fund up to twenty per cent. of the subscribed capital, and no more."

See also *Re Macdonald, etc. Co.*, 69 L. T. Rep. 567 (1893).

§ 15. *The name of a corporation.*—A corporation has an existence distinct from that of the individuals constituting it. Hence, for the purposes of identification and perpetuity, it is essential that the corporation have a name.

The corporate name is usually the choice of the incorporators, and is specified in the creating instrument. By this name it takes and grants property, sues and is sued, and does all corporate acts.¹ The right of a corporation to the exclusive use of its chosen name is recognized by statute in many states, but is usually protected independently of any statute.²

¹ Viner's Abr., Corporation; Bacon's Abr., Corporation; 1 Bl. Com. 475, 476; *Glass v. Tipton, etc. Co.*, 32 Ind. 376 (1869). Statutes relative to corporations usually prescribe, expressly or by implication, that the articles of incorporation shall specify the name assumed by the corporation. In *Wells v. Oregon R'y, etc. Co.*, 15 Fed. Rep. 561, 567 (1883), it is said that the statute might create a corporation without any special designation, although some description would be necessary, and then it might subsequently acquire a name. Corporations are required both at common law and by the statutes of all the states to have names. *Glass v. Tipton, etc. Co.*, 32 Ind. 376 (1869). The corporate name has been variously spoken of as "the very being of the constitution," "the knot of their combination," "as the name of baptism," "the substance and essence of it." The form of the name is sometimes prescribed by statute, as that it shall begin with "The" and end with "company," "corporation," "association" or "society." Colo. Gen. Laws, 1877, pp. 143, 144. See also Conn. Gen. Stat. 1888, § 1905. In *Hammond v. Hastings*, 134 U. S. 401 (1890), the name of the corporation was "George H. Hammond & Company." The court held that even if this name on the certificate of stock did not give notice that it was a corporation, yet that a lien on the stock was sufficient. *School*

districts erected under a general law, which does not require the designation of a name, may acquire such for the purposes of suits and other corporate acts by usage. *South School Dist. v. Blakeslee*, 13 Conn. 227 (1839). The West Virginia Code, 1891, p. 503, § 11, prescribes that "no joint-stock company shall adopt the same name which is being used at the time by another corporation of this state." N. Y. Laws, 1895, ch. 672, prohibits even the selection of a name sufficiently resembling another as to deceive. See also Mo. Rev. St. 1889, §§ 2496, 2768. An author cannot repudiate his contract with a corporation, although the corporation has the same name as a person who has fled from a criminal prosecution. *Jewett Pub. Co. v. Butler*, 159 Mass. 517 (1893).

² Thus, it is said that a corporate name legally acquired should be protected upon the same principle and to the same extent that individuals are protected in the use of trade-marks. *Holmes, etc. v. Holmes, etc. Co.*, 37 Conn. 273, 293 (1870). The corporate name is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy deserves the same consideration and protection from a court of equity. The case of an encroachment is analogous to if not stronger than that of a piracy upon an established trade-mark. *Newby*

The matter of protecting the use of a corporate name is intrinsically of equitable cognizance, as the injured party seldom if ever has an adequate and complete remedy at law. To prevent the continuance of such a wrong equity will interfere, and at the suit of the injured party will grant an injunction.¹

v. Oregon Cent. R'y, Deady, 609, 616 (1869); S. C., 18 Fed. Cas. 38. *Cf.* Goodyear's India Rubber, etc. Co. *v.* Goodyear Rubber Co., 128 U. S. 598 (1888). State officials cannot be enjoined from allowing a domestic corporation to take the name that a foreign corporation has, even though a fraud is worked thereby. *Lehigh Valley Coal Co. v. Hamblen*, 23 Fed. Rep. 225 (1885). In Massachusetts, by statute, a foreign corporation doing a banking, loan, trust or investment business in the state cannot use the same name as or a similar name to a domestic corporation. *International T. Co. v. International L. & T. Co.*, 153 Mass. 271 (1891). A corporation may take a name which an old corporation is about to take by change of name. *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423 (1892). A foreign corporation cannot prevent a domestic corporation from using the same name, where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. *Hazelton Boiler Co. v. Hazelton, etc. Co.*, 142 Ill. 494 (1892).

¹*Ottoman Cahvey Co. v. Dane*, 95 Ill. 203 (1880). Equity will always interfere where the same name has been wrongfully appropriated. Where only a similar name is used it is usually held that some actual damage, past, present or imminent, must be shown. A corporation will be protected in its name as a trade-mark. Often so by statute. *State v. McGrath*, 92 Mo. 355 (1887). A corporation may enjoin

another corporation from taking and using its name. *Farmers' L. & T. Co. v. Farmers' L. & T. Co.*, 1 N. Y. Supp. 44 (1888). The use of any particular name by a corporation will not be enjoined unless it be clearly proven that the complainant will suffer injury. *Drummond Tobacco Co. v. Randle*, 114 Ill. 412 (1885); *London, etc. Ass. Soc. v. London, etc. Ins. Co.*, 11 Jur. 938 (1847); *Newby v. Oregon Cent. R'y*, Deady, 609, 616 (1869); S. C., 18 Fed. Cas. 38; *Holmes, etc. v. Holmes, etc. Co.*, 37 Conn. 278, 295 (1870), where the language of the court is as follows: "The ground on which courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry." A New York corporation, "Goodyear Rubber Co.," cannot enjoin a Connecticut corporation from using substantially the same name. *Goodyear's India Rubber, etc. Co. v. Goodyear Rubber Co.*, 128 U. S. 598 (1888); rev'g 21 Fed. Rep. 276 (1884). *Cf.* *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436 (1889). The corporate name is not a franchise, even though it is a trade-mark. *Hazelton Boiler Co. v. Hazelton, etc. Co.*, 137 Ill. 231 (1891). A benevolent corporation cannot object to a subsequent corporation assuming a somewhat similar name. *American, etc. Clans v. Merrill*, 151 Mass.

The New York court of appeals states the law on this subject when it says:

"In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive."¹

558 (1890). The words "employers' liability," used in the name of an insurance company, may be used in the name of another insurance company, both companies being foreign corporations. *Employers', etc. Corp. v. Employers', etc. Co.*, 10 N. Y. Supp. 845 (1890). A corporation of Nebraska, "The Nebraska Loan & Trust Company," cannot enjoin another Nebraska corporation, the "Nebraska Loan & Trust Company," from using that name. The name is too general for a trade-mark, and the location of the companies in different cities prevents confusion of business. *Nebraska Loan, etc. Co. v. Nine*, 27 Neb. 507 (1889). Technically this decision may be correct, but when such a fraud is sustained by the courts it is time for the legislature of Nebraska to enact the usual law against one corporation assuming the name of a prior corporation. The corporate name "Richardson & Boynton Company" does not prevent another company using the name "Richardson & Morgan Company." *Richardson, etc. Co. v. Richardson, etc. Co.*, 8 N. Y. Supp. 52 (1889). If a corporation wrongfully refuses to accept watch movements with its name thereon the manufacturer may sell them with that name on. *McCulloh v. Smith*, 44 Fed. Rep. 12 (1890). The "International Banking Company" cannot

prevent another concern using the name the "International Bank." *Koehler v. Sanders*, 122 N. Y. 65 (1890). Where a company has a well established and known business, and a person having the same name attempts to incorporate under his name and carry on the same business, although he was never in the business before, he will be restrained. *Tussaud v. Tussaud*, L. R. 44 Ch. D. 678 (1890). While there may be "nothing in the adoption of a name which is borne by another which infracts any known law" (*Re Baptist Church*, 3 Haz. Pa. Reg. 225 (1828); S. C., 1 Haz. Pa. Reg. 75), yet approval of the proposed articles of incorporation will generally be withheld if the name conflicts with that of an existing corporation. *Re First Presbyterian Church of Harrisburg*, 2 Grant Cas. (Pa.) 240 (1858); *Re Sons of Progress*, 14 W. N. Cas. 31 (1883).

¹ *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462 (1895).

Where a corporation selects its name in order to get another company's business, it is no defense that the name of the former is the name of its chief stockholder. *William Rogers Mfg. Co. v. R. W. Rogers Co.*, 66 Fed. Rep. 56 (1895).

The court will not authorize a corporation to change its name, where injury will result to another corpo-

A corporation has neither the right nor the power to change the corporate name originally selected unless it is allowed so to do by the laws under which it has been created, or by the consent of the authority from which its charter is derived; but a change of name even without authority does not affect the obligations of the company.¹

ration, or an imposition or deceit will result by reason of the confusion of the names. *Re U. S. Mortgage Co.*, 83 Hun, 572 (1895).

A name is protected like a trademark, but five years' delay in complaining is fatal. Moreover a seceding part of an unincorporated association cannot by incorporation obtain the exclusive right to the old name. *United Workmen v. Graham*, 96 Iowa, 592 (1896).

The "Sun Life Assurance Society" of England cannot restrain the "Sun Life Assurance Company of Canada" from doing business in England, there being no actual fraud practiced or attempted; but the latter company must not abbreviate its name so as to mislead the public. *Saunders v. Sun, etc. Co.*, 69 L. T. Rep. 755 (1893).

The Elgin Butter Company cannot object to another company using the name the Elgin Creamery Company. *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127 (1895).

The Home Life Insurance Company, a New York corporation, cannot prevent a Michigan corporation from organizing under the name The Home Life Assurance Company. *People v. Home, etc. Co.*, 69 N. W. Rep. 653 (Mich., 1897).

A committee appointed by a voluntary association to obtain a charter may incorporate in the name of the voluntary association, and the association cannot enjoin the use of such name. *Paulino v. Portuguese Ben. Assoc.*, 18 R. I. 165 (1893).

Although the name of a domestic corporation is very similar to that of

an existing domestic corporation, yet where there is no evidence that the latter company knew of the former, and no sufficient proof that any one is deceived, the court may, in the exercise of a sound discretion, refuse to enjoin the latter corporation from using the name—the name of the first company being the Hygeia Water Ice Company, and of the latter the New York Hygeia Ice Company, Limited. *Hygeia, etc. Co. v. New York, etc. Co.*, 140 N. Y. 94 (1893).

¹ In the case of voluntary religious societies constituted under general laws, without a special act of incorporation and without an established name, names are purely arbitrary, and changes therein do not at all affect their identity. *Trinity Church v. Hall*, 22 Conn. 125 (1852); *Cahill v. Bigger*, 8 B. Mon. (Ky.) 211 (1848). So the identity and rights of a municipal corporation are not affected by a change of its name. *Girard v. Philadelphia*, 7 Wall. 1 (1868). The power is sometimes given by the legislature to the courts to change the name of any corporation within their jurisdiction upon proper notice being given to the auditor-general; and this applies to religious corporations. *Re First Presbyterian Ch.*, 111 Pa. St. 156 (1885). A reorganization, with change of name, under a statute, does not affect fixed or running obligations. *Hyatt v. McMahon*, 25 Barb. 457 (1857); *City Nat. Bank v. Phelps*, 16 Hun, 158 (1878). As to a change of name under the New York statute, see *Re U. S. etc. Agency*, 115 N. Y. 176 (1889). A judgment in the new

While a corporation cannot change its corporate name, it may nevertheless become known by another name through usage; and the courts have frequently treated acts done and contracts entered into by corporations under another name as having been done or entered into by it under its true name.¹

name which a corporation has taken by proceedings under a statute is valid although such proceedings to change the name were not regular. *King v. Ilwaco, etc. Co.*, 1 Wash. St. 127 (1890). An irregular and ineffectual attempt to change the name of a corporation does not affect its charter. *O'Donnell v. C. R. Johns Co.*, 76 Tex. 363 (1890). A corporation cannot change its name unless allowed by statute so to do. *Sykes v. People*, 132 Ill. 32 (1890); *Bellows v. Hallowell, etc. Bank*, 2 Mason, 31 (1819); S. C., 3 Fed. Cas. 144. In some states it is provided in the general laws that the corporate name may be changed by a resolution of the stockholders or of the directors, properly filed and recorded. Me. Rev. St. 1883, ch. 46, § 6; Tenn. Code, 1896, § 2028; *Shackleford, etc. Co. v. Dangerfield*, L. R. 3 C. P. 407 (1868), under the English Companies Act. Similar provision is sometimes made in special acts. *Morris v. St. Paul, etc. R'y*, 19 Minn. 528 (1873); *Attorney-General v. Joy*, 55 Mich. 94, 106 (1884). Or the change may be directly made by the special act. *Wallace v. Loomis*, 97 U. S. 146, 154 (1877); *Alexander v. Berney*, 28 N. J. Eq. 90, 92 (1877). Cf. *Pacific Bank v. De Ro*, 37 Cal. 538 (1869). Or the original special act of incorporation may provide for a change by an order of the directors approved by the stockholders. *Wells v. Oregon R'y & Nav. Co.*, 15 Fed. Rep. 561 (1883). If the legislature changes the name of a corporation without altering its powers or identity, it does not affect a controversy between the company and third parties. *Rosenthal v. Madison, etc. Co.*, 10 Ind. 358 (1853). As to the

right of the corporation to maintain an action on a note executed to it in the old name, *Northwestern College v. Schwagler*, 37 Iowa, 577 (1873). A grant to a church in a particular name is not lost by a subsequent change of name. *Cahill v. Bigger*, 8 B. Mon. (Ky.) 211 (1848). Where a railroad company was authorized by special act to change its name or the names of its branches, and did change the name of one branch and of itself in the management of such branch, *held*, that for the purpose of suits its original name remained unchanged. *Morris v. St. Paul, etc. R'y*, 19 Minn. 528 (1873). The change of a corporation's name does not affect its real-estate contracts. *Welfley v. Shenandoah, etc. Co.*, 83 Va. 768 (1887). Nor an obligation on a bond. *West v. Carolina L. Ins. Co.*, 31 Ark. 476 (1876). A guaranty to pay for goods thereafter delivered by Crane Bros. Manufacturing Company cannot be enforced by the company, where it changed its name to Crane Company before the goods were delivered. *Crane Co. v. Specht*, 39 Neb. 123 (1894).

¹ *Society for Propagating Gospel v. Young*, 2 N. H. 310 (1820). Where two insurance corporations in issuing a policy use a name to designate both of them they may be sued under that name. *Ferry v. Cincinnati Underwriters*, 69 N. W. Rep. 483 (Mich., 1896). An assignment by a corporation in a name which it has adopted but not recorded as required by statute is good. *Woodrough, etc. Co. v. Witte*, 89 Wis. 537 (1895). In *McGary v. People*, 45 N. Y. 153 (1871), it is held (three justices dissenting) that a misnomer of the corporation owner of

Modern law has departed from the strict rules of the common law as to the use of the corporate name. As corporations are now able to contract almost as freely as natural persons, it is held that a departure from the strict name of a corporation will not avoid its contract if its identity substantially appears; and a latent ambiguity may, under proper averments, be explained by parol.¹ Where a corporation has been enjoined from

the property in an indictment for arson is fatal. *Smith v. Tallasse*, etc. Co., 30 Ala. 650, 664 (1857); *South School District v. Blakeslee*, 13 Conn. 227 (1839); *Minot v. Curtis*, 7 Mass. 441 (1811), where the court, in using the language, "We know not why corporations may not be known by several names as well as individuals," evidently had in mind certain classes of corporations and societies. Identity may be a question of fact for the jury. *Dutch West India Co. v. Van Moses*, 1 Stra. 612 (1725). An assignment of a claim against a corporation need not accurately describe its name. *Adler v. Kansas City*, etc. R. R., 92 Mo. 242 (1887). A corporation is bound by an abbreviated name. *People v. Sierra*, etc. Co., 39 Cal. 511, 514 (1870). There is a distinction in some of the old cases to the effect that corporations by prescription may have several names, while with charter corporations it is otherwise. *Anonymous* (2), 3 Salk. 102 (1703); *Mercers, etc. of Shrewsbury v. Hart*, 1 Car. & P. 113 (1823); *Hammond v. Shepard*, 29 How. Pr. 188, 191 (1865); *Thomas v. Dakin*, 22 Wend. 9, 72 (1839); *Melledge v. Boston Iron Co.*, 59 Mass. 158, 175 (1849); *Medway Cotton Manuf'y v. Adams*, 10 Mass. 360 (1813); *Alexander v. Berney*, 28 N. J. Eq. 90 (1877), holding that a corporation, through its retaining the use of its original name after the passage of an amendatory act changing it, regained, so to speak, its original name, and could be sued and be proceeded against in bankruptcy by it.

Where the company signs a contract under an assumed name the contract may be enforced against it. *Marmet Co. v. Archibald*, 37 W. Va. 778 (1893). In *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356 (1894), the remarkable conclusion was reached that where a corporation changed its name and used the new name without complying with the statute the stockholders were liable as partners.

¹*Haag v. County Com'rs*, 34 Fed. Rep. 778 (1888); *Berks, etc. Road v. Myers*, 6 Serg. & R. (Pa.) 12, 17 (1820); *Boisgerard v. New York Banking Co.*, 2 Sandf. Ch. 23 (1844); *Hammond v. Shepard*, 29 How. Pr. 188 (1865); *Gifford v. Rockett*, 121 Mass. 431 (1877); *Melledge v. Boston Iron Co.*, 59 Mass. 158, 175 (1849); *Medway Cotton Manuf'y v. Adams*, 10 Mass. 360 (1813); *Commercial Bank v. French*, 38 Mass. 486 (1839); *Hascall v. Life Assoc.*, 5 Hun, 151 (1875); *Conro v. Port Henry Iron Co.*, 12 Barb. 27, 55 (1851); *Northwestern Dist. Co. v. Brant*, 69 Ill. 658 (1873). Cf. *New York African Soc. v. Varick*, 13 Johns. 38 (1816); *Mott v. Hicks*, 1 Cow. 513 (1823); *Brockway v. Allen*, 17 Wend. 40 (1837). Although by error land is deeded to a corporation not by its right name but by a name which another corporation has, yet the latter company does not take title. *Clarke v. Milligan*, 58 Minn. 413 (1894). The omission of part of the corporate name in the assignment of a mortgage by a corporation is immaterial. *Chilton v. Brooks*, 71 Md. 445 (1889). Although the name used in a contract is different from the

using its name this is cause for a dissolution, at the instance of the stockholders.¹

corporate name, yet if the identity is clear the contract is enforceable. *Hasselmann v. Japanese, etc. Co.*, 2 Ind. App. 180 (1891). There is a line of cases where corporations draw or accept bills or make deeds in another name merely as a convenient mode of doing the special act of business, and they are held liable although the corporate name is not mentioned. In such cases they are to be sued in their true name. *Culpeper Agric. etc. Soc. v. Digges*, 6 Rand. (Va.) 165 (1828); *Milford, etc. Co. v. Brush*, 10 Ohio, 111 (1840); *Ryan v. Martin*, 91 N. C. 464 (1884); *Asheville Division v. Aston*, 92 N. C. 578 (1885); *Clement v. Lathrop*, 18 Fed. Rep. 885 (1884); *Bridgeford v. Hall*, 18 La. Ann. 211, 218 (1866); *Brock Dist. Council v. Bowen*, 7 U. C. Q. B. 471 (1850). A misnomer has been held material in the following cases: Where a corporation is required by statute to act for its own benefit, as in collecting assessments for benefit to land from its proposed road. *Glass v. Tipton, etc. Co.*, 32 Ind. 376 (1869). In an indictment for arson. *McGary v. People*, 45 N. Y. 153 (1871). Where the name in a *fi. fa.* was different from that by which the corporation was sued and judgment had. *Bradford v. Water Lot Co.*, 58 Ga. 280 (1877). *Cf.* Ga. Code, § 3636. A variation will not in general invalidate a deed, grant, or lease by or to a corporation when the true name can be collected from the instrument or is shown by proper averments. 2 Kent, Com. 292; *Bacon, Abr., Corporation*; *Kentucky Seminary v. Wallace*, 15 B. Mon. (Ky.) 35, 45 (1854); *Clarke v. Potter County*, 1 Pa. St. 159 (1845); *Douglass v. Mobile Branch Bank*, 19 Ala. 659 (1851); *Culpeper Agric. etc. Soc. v. Digges*, 6 Rand. (Va.) 165 (1828); 1 Kyd, Corp. 286, 288; Com. Dig.,

Pleader, 2, B. 2; *Case of Linne Regis*, 10 Co. 122*b*, 125*b* (1613); *Ayray's Case*, 11 Co. 18*b* (1612). At common law a substantial variance between the name of the party injured as laid in the indictment and as given in evidence was fatal; and it was so held in New York, in a case involving a misnomer of the corporate owner of the property. *McGary v. People*, 45 N. Y. 153 (1871), three judges dissenting; *Sykes v. People*, 132 Ill. 32 (1890). But this rule is modified in some jurisdictions, as by the Penal Code of California, section 956. See *People v. Potter*, 35 Cal. 110 (1868). *Cf.* N. Y. Code Crim. Proc., § 281. *Cf.*, also, *People v. Runkel*, 9 Johns. 147, 156 (1812).

A slight variation in documentary evidence of a national bank's corporate existence which does not go to raise a doubt of the identity is to be disregarded. *Thatcher v. West River Nat. Bank*, 19 Mich. 196 (1869). "A corporation may sue or be sued only by its corporate name." Iowa Rev., § 1151; Iowa Code, § 1059. "It is immaterial what name it does its business under. A corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing the articles of incorporation." Where a corporation sued on an agreement, and alleged a due and legal change of name between the time of the execution and the suit, it was held such change must be proved by the articles and not by testimony of the secretary. *Chicago, etc. R. R. v. Keisel*, 43 Iowa, 39 (1876). A suit brought against the Bell Telephone Company is sustainable though the corporate name is the American Bell Telephone Company. *State v. Bell Telephone Co.*, 36

¹ *Re Thomas, etc. & Sons, Ltd.*, 76 L. T. Rep. 100 (1897).

§ 15a. *Statutes which apply to "persons" are generally construed to apply to corporations.*—Thus, a statute authorizing persons to obtain a discharge from their debts upon going through certain insolvency proceedings applies to a corpora-

Ohio St. 296 (1880). When the corporate name has once correctly appeared it is generally not necessary that it should be completely stated at every recurrence in a pleading. *Antipæda Bapt. Ch. v. Mulford*, 8 N. J. L. 182 (1825); *London v. Lynn*, 1 H. Bl. 206 (1789); *Stafford v. Bolton*, 1 Bos. & P. 40 (1797); *Case of Lynne Regis*, 10 Rep. 120 (1613). In an action or special proceeding brought by or against a corporation the defendant is deemed to have waived any mistake in the statement of the corporate name unless the misnomer is pleaded in the answer or other pleading in the defendant's behalf. N. Y. Code Civ. Pro., § 1777. So generally a misnomer is not ground for a nonsuit and must be pleaded in abatement. *Whittlesey v. Frantz*, 74 N. Y. 456 (1878); *Bank of Utica v. Smalley*, 2 Cow. 770 (1824); *Methodist Ep. Church v. Tryon*, 1 Denio, 451 (1845); *Lake Superior Bldg. Assoc. v. Thompson*, 32 Mich. 293 (1875); *Northumberland Co. Bank v. Eyer*, 60 Pa. St. 436 (1869); *Wilson v. Baker*, 52 Iowa, 423 (1879); *Medway Cotton Manuf'y v. Adams*, 10 Mass. 360 (1813); *Gilbert v. Nantucket Bank*, 5 Mass. 97 (1809); *State v. Bell Teleph. Co.*, 36 Ohio St. 296 (1880); *Sunapee v. Eastman*, 32 N. H. 470 (1855); *Burnham v. Strafford Co. Sav. Bank*, 5 N. H. 446 (1831); *School District v. Griner*, 8 Kan. 224 (1871). Misnomer is pleadable in abatement, but not in bar. *Baltimore, etc. R. R. v. Fifth Bapt. Church*, 137 U. S. 568 (1891). Proceedings for perpetuating testimony are not admissible when only the letters "C., B. & Q. R. R. Co." are used to designate defendant. *Accola v. Chicago, etc. R'y*, 70 Iowa, 185 (1886). *Cf. Martin v. Central Iowa R'y*, 59 Iowa, 411 (1882); *Stone v. East Berkshire Cong. Soc.*, 14 Vt. 86 (1842); *Souhegan, etc. Factory v. McConihe*, 7 N. H. 309 (1834); *Bank of Metropolis v. Orme*, 3 Gill (Md.), 443 (1845); *Gray v. Monongahela Nav. Co.*, 2 Watts & S. (Pa.) 156 (1841); *Stafford v. Bolton*, 1 Bos. & P. 40 (1797); *Beene v. Cahawba, etc. R. R.*, 3 Ala. (N. S.) 660 (1842); *Lafayette Ins. Co. v. French*, 18 How. 405 (1855). *Cf. Brittain v. Newland*, 2 Dev. & B. (N. C.) L. 363 (1837); *Traver v. Eighth Ave. R. R.*, 4 Abb. Dec. 422 (1867); *Mauney v. High Shoals Mfg. Co.*, 4 Ired. Eq. (N. C.) 195 (1845). A mistake in setting out the name of a corporation party in a pleading may be corrected by amendment. *Smith v. Central Plank-road Co.*, 30 Ala. 650, 662 (1857); *Bullard v. Nantucket Bank*, 5 Mass. 99 (1809); *Sherman v. Connecticut River Bridge*, 11 Mass. 338 (1814); *Brittain v. Newland*, 2 Dev. & B. (N. C.) L. 363 (1837). Or if manifestly immaterial no objection will be allowed. *Baltimore Marine Bank v. Biays*, 4 Har. & J. (Md.) 338 (1818). And judgment will not be arrested. *Coulter v. Western Theol. Seminary*, 29 Md. 69 (1868). There is little uniformity in the acts incorporating towns and villages; but where a corporate name is established it is usually held that suits must be brought and defended in such name. *Romeo v. Chapman*, 2 Mich. 179 (1851). In the case of a misnomer in a devise the courts are very liberal in permitting the identity of the corporation to be otherwise shown. *Deaf and Dumb Inst. v. Norwood*, Busb. (N. C.) Eq. 65 (1852); *First Parish in Sutton v. Cole*, 20 Mass. 232 (1825); *Minot v.*

tion, and it may obtain such a discharge.¹ A statute prohibiting "persons" from engaging in banking applies not only to natural persons but also to corporations.² A corporation is

Boston Asylum, 48 Mass. 416 (1844); St. Louis Hospital Assoc. v. Williams, 19 Mo. 609 (1854); Preachers' Aid Soc. v. Rich, 45 Me. 552 (1858); Vansant v. Roberts, 3 Md. 119 (1852); New York Inst. for Blind v. How, 10 N. Y. 84 (1854); Domestic, etc. Soc.'s Appeal, 30 Pa. St. 425 (1858); Cresson's Appeal, 30 Pa. St. 437 (1858); Newell's Appeal, 24 Pa. St. 197 (1855); Chapin v. Winchester School Dist., 35 N. H. 445 (1857); Button v. American Tract Soc., 23 Vt. 336 (1851); Hornbeck v. American Bible Soc., 2 Sandf. Ch. 133 (1844); Attorney-General v. Rye, 7 Taunt. 546 (1817); General Lying-in Hospital v. Knight, 21 L. J. Ch. 537 (1851); Re Kilvert's Trusts, L. R. 7 Ch. App. 170 (1871); Jarman, Wills, 326. Where a corporation voluntarily appears under a wrong name it becomes a party in such name and may not object to a decree for want of process against it. Virginia, etc. Nav. Co. v. United States, Taney, 418 (1840); S. C., 28 Fed. Cas. 1229; State v. Bell Teleph. Co., 36 Ohio St. 296 (1880); School District v. Griner, 8 Kan. 224 (1871). So, in general, whenever, for any purpose, a corporation is described, a slight variance will not be held material. Burdine v. Grand Lodge, 37 Ala. 478 (1861); Souhegan, etc. Factory v. McConihe, 7 N. H. 309 (1834). In the case of a misnomer in a notice required by statute to be given as a condition precedent to an action where there was no possibility of anybody being misled, Pollock, C. B., said: "For the credit of Westminster Hall we ought to refuse this rule." Eastham v. Blackburn R'y, 23 L. J. Exch. 199 (1854). See also Bruce County v. Cromar, 22 L. J. Exch. 321, 327 (1863); Trent, etc. Co. v. Marshall, 10

U. C. C. P. 329, 336 (1861); Hawkins v. Municipal Council, etc., 2 U. C. C. P. 72, 121 (1852); Whitby v. Harrison, 18 U. C. Q. B. 603 (1859); Croydon Hospital v. Farley, 6 Taunt. 467 (1816); Doe v. Miller, 1 B. & Ald. 699 (1818); Hagerstown Turnp. Co. v. Creeger, 5 Har. & J. (Md.) 122 (1820); Hoboken Bldg. Assoc. v. Martin, 13 N. J. Eq. 427 (1861); Upper Alloways Creek v. String, 10 N. J. L. 323 (1829); Woolwick v. Forest, 2 N. J. L. 115 (1806); Middletown v. McCormick, 3 N. J. L. (3d ed.) 92 (1809); Granville Charitable Assoc. v. Baldwin, 42 Mass. 359 (1840); Lowell v. Morse, 42 Mass. 473 (1840); Shawmut Sugar Co. v. Hampden Mut. Ins. Co., 78 Mass. 540 (1859); Levant Trustees v. Parks, 10 Me. 441 (1833); Newport Mechanics' Mfg. Co. v. Starbird, 10 N. H. 123 (1839); Society for Propagating Gospel v. Young, 2 N. H. 310 (1820); Delaware, etc. R. R. v. Irick, 23 N. J. L. 321 (1852). Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan v. Francklyn, 20 N. Y. Supp. 404 (1892).

¹ Barth v. Backus, 140 N. Y. 230 (1893).

² People v. Utica Ins. Co., 15 Johns. 358 (1818). A corporation may be a "person" within the meaning of the words of a statute. Jeffries Neck Pasture v. Ipswich, 153 Mass. 42 (1891). A statute authorizing tax commissioners to reduce an assessment, and to extend the time for applying therefor in case of illness, etc., applies to corporations, and if the officers are absent or ill, the corporation is entitled to further time. People v. Barker, 140 N. Y. 437 (1893).

subject to a statute which prescribes that a "person" shall be subject to a penalty;¹ or that the United States shall be a preferred creditor;² or that all "inhabitants" or "residents" shall pay taxes;³ or that testimony shall be admitted as against certain "persons;"⁴ or that "persons" may do certain acts in regard to promissory notes;⁵ or that a local court shall have jurisdiction;⁶ or that property may be attached;⁷ or shall be guilty of a misdemeanor;⁸ or that "persons" shall be liable for damages for injuries which result in death;⁹ or in case of injury by a dam;¹⁰ or a statute which allows "owners" of vessels to obtain a registry,¹¹ or gives a mechanic's lien to "persons."¹² A trust company is not a bank within the meaning of a criminal statute.¹³ Stockholders are liable for taxes levied on a distillery, where the statute levies the tax on "persons interested in the use of the distillery."¹⁴ A foreign corporation is a "person" outside of the state as regards the statute of limitations.¹⁵ But a foreign corporation is not a "resident" within the chattel-

¹ U. S. v. Amedy, 11 Wheat. 392 (1826). *Contra*, Androscoggin, etc. Co. v. Bethel, etc. Co., 64 Me. 441 (1874); Cumberland, etc. Corp. v. Portland, 56 Me. 77 (1868).

² Beaton v. Farmers' Bank, 12 Pet. 102 (1838). *Contra*, Commonwealth v. Phoenix Bank, 52 Mass. 129 (1846).

³ Bank of U. S. v. Deveaux, 5 Cranch, 61 (1809); Rex v. Gardner, Cowp. 79 (1774); Otis Co. v. Ware, 74 Mass. 509 (1857); International, etc. Soc. v. Com'rs, 28 Barb. 318 (1858); Baldwin v. Ministerial Fund, 37 Me. 369 (1854); Cortis v. Kent Water Works, 7 B. & C. 314 (1827). *Contra*, Hartford F. Ins. Co. v. Hartford, 3 Conn. 15 (1819).

⁴ La Farge v. Exchange F. Ins. Co., 22 N. Y. 352 (1860).

⁵ State v. Woram, 6 Hill, 33 (1843).

⁶ Brown v. Mayor, etc., 66 N. Y. 385 (1876); Bristol v. Chicago, etc. R. R., 15 Ill. 436 (1854); Bank of North America v. Chicago, etc. R. R., 82 Ill. 493 (1876); Eslava v. Ames Plow Co., 47 Ala. 384 (1872).

⁷ Knox v. Protection Ins. Co., 9 Conn. 430 (1833); Mineral Point R. R.

v. Keep, 22 Ill. 9 (1859); Trenton Bkg. Co. v. Haverstick, 11 N. J. L. 171 (1829); Bushel v. Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173 (1827); Planters', etc. Bank v. Andrews, 17 Ala. (O. S.) 404 (1838). Or garnished. Brauser v. New England, etc. Ins. Co., 21 Wis. 506 (1867).

⁸ White v. State, 69 Ind. 273 (1879).
⁹ Southwestern R. R. v. Paulk, 24 Ga. 356 (1858).

¹⁰ Lehigh Bridge v. Lehigh Coal & Nav. Co., 4 Rawle (Pa.), 8 (1833).

¹¹ Regina v. Arnaud, 9 Q. B. 806 (1846).

¹² Chapman v. Brewer, 43 Neb. 590 (1895).

¹³ State v. Reid, 125 Mo. 43 (1894).

¹⁴ U. S. v. Wolters, 46 Fed. Rep. 509 (1891).

¹⁵ Olcott v. Tioga R. R., 20 N. Y. 210 (1859); Blossburg, etc. R. R. v. Tioga R. R., 5 Blatchf. 387 (1867); S. C., 3 Fed. Cas. 735. *Contra*, Connecticut, etc. Ins. Co. v. Duerson, 28 Gratt. (Va.) 630 (1877), where it had an agent in the state to accept service.

mortgage act;¹ nor is a domestic corporation a "resident taxpayer," so as to be counted in voting municipal aid to railroads;² nor is a state a person, and as such entitled to take by devise.³ A corporation is not a "citizen" within the meaning of the federal constitution;⁴ but is a "person" within the meaning of the fourteenth amendment.⁵

§ 15b. *Torts committed by corporations — Exemplary damages — Indictment.*— After much discussion the general rule is now firmly established that corporations cannot make defense to actions in tort by claiming that the acts by which the wrongs have been committed are not within the corporate powers conferred upon them.⁶

¹ Cook v. Hager, 3 Colo. 386 (1877).

² People v. Schoonmaker, 63 Barb. 44 (1871). Cf. Crafford v. Warwick County, 87 Va. 110.

³ Re Fox, 52 N. Y. 530 (1873); U. S. v. Fox, 94 U. S. 315 (1876).

⁴ See § 696, *infra*. Cf. McKinley v. Wheeler, 130 U. S. 630 (1889); Thomas v. Chisholm, 13 Colo. 105 (1889).

⁵ San Mateo County v. Southern Pacific R. R., 13 Fed. Rep. 722 (1882).

⁶ National Bank v. Graham, 100 U. S. 699, 702 (1879), where a bank was held in damages for the loss, occasioned by the gross negligence of its agents, of a special deposit which it had received with the knowledge and acquiescence of its officers and directors; Baltimore, etc. R. R. v. Fifth Baptist Ch., 108 U. S. 317 (1882), for maintaining a nuisance; Philadelphia, etc. R. R. v. Quigley, 21 How. 202, 210 (1858), for libel published by the board of directors, Campbell, J., saying: "For acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." This rule was directly affirmed and applied to a municipal corporation in Salt Lake City v. Hollister, 118 U. S. 256 (1886). See New York, etc. R. R. v. Schuyler, 34

N. Y. 30 (1865); State v. Morris, etc. R. R., 23 N. J. L. 360, 367 (1852), and cases cited; Brokaw v. New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867), an action for assault and battery (ejecting a passenger); Ramsden v. Boston, etc. R. R., 104 Mass. 117 (1870), assault and battery (seizing property for fare); Peebles v. Patapsco Guano Co., 77 N. C. 233 (1877), a case of deceit and fraudulent representations made by agents; Chicago, etc. R. R. v. Davis, 86 Ill. 20 (1877), trespass, see *infra*; Vinas v. Merchants' Mut. Ins. Co., 27 La. Ann. 367 (1875), slander and libel sanctioned by a corporation; Western Union Tel. Co. v. Eyser, 2 Colo. 141 (1873), injury to person; Goodspeed v. East Haddam Bank, 22 Conn. 530 (1853), vexatious suit; South, etc. R. R. v. Chappell, 61 Ala. 527 (1878), injury to person; Hays v. Houston, etc. R. R., 46 Tex. 272 (1876), expulsion from train; Fishkill Sav. Inst. v. Fishkill Nat. Bank, 80 N. Y. 162 (1880), conversion of bonds by cashier; Ranger v. Great Western R'y Co., 5 H. L. Cas. 72, 86 (1854); Lewis v. Meier, 14 Fed. Rep. 311 (1882); Philadelphia, etc. R. R. v. Derby, 14 How. 468 (1852), injury to person in a collision caused by the negligence of employees; Hussey v. Norfolk, etc. R. R., 98 N. C. 34 (1887), malicious prosecution and false imprisonment, the

Where it is necessary to prove a fraudulent or malicious intent, it is held, by the great weight of modern authority, that the fraud or malice of the authorized agents of corporations is to be imputed to the corporations themselves.¹

Although a corporation may not strictly be guilty of deceit, yet it is held liable for damages resulting from the false and fraudulent representations of its agents.²

court saying: "These artificial persons have become so numerous, and entered so largely into the everyday transactions of life, that it has become the policy of the law to subject them, as far as practicable, to the same civil liability for wrongful acts as attach to natural persons;" *Denver, etc. R'y v. Harris*, 122 U. S. 597 (1887), assault and battery; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637 (1887), undue violence by employee; *New Orleans, etc. R. R. v. Bailey*, 40 Miss. 395 (1866). A railroad which has engaged in transporting passengers by a steamboat cannot defeat an action for negligence by asserting that the use of the steamboat by it was *ultra vires*. *Gruber v. Washington, etc. R. R.*, 92 N. C. 1 (1885); *South Wales R'y v. Redmond*, 10 C. B. (N. S.) 675 (1861). *Contra*, *Gunn v. Central R. R.*, 74 Ga. 509 (1885), where a railroad was held *not* responsible for a tort (an injury to the person) committed by a firm in which it had become, although illegally, a *partner*.

¹*National Exch. Co. v. Drew*, 2 Macq. H. L. Cas. 103 (1855); *New Brunswick, etc. R'y v. Conybeare*, 9 H. L. Cas. 711, 740 (1862); *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259 (1867); *Philadelphia, etc. R. R. v. Quigley*, 21 How. 202 (1858); *Whitfield v. Southeastern R'y*, El. B. & E. 115 (1858); *Vance v. Erie R'y*, 32 N. J. L. 334 (1867); *Copley v. Grover, etc. Co.*, 2 Woods, 494 (1875); S. C., 6 Fed. Cas. 517; *Goodspeed v. East Hadam Bank*, 22 Conn. 530 (1853); *Carter*

v. Howe Machine Co., 51 Md. 290 (1878); *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469 (1872); *Williams v. Planters' Ins. Co.*, 57 Miss. 759 (1880); *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505 (1877); *Edwards v. Midland R'y*, L. R. 6 Q. B. D. 287 (1880); *Jeffersonville R. R. v. Rogers*, 28 Ind. 1, 7 (1867). *Cf.* *Walker v. Southeastern R'y*, L. R. 5 C. P. 640 (1870); *Smith v. Southeastern R'y*, L. R. 5 C. P. 640 (1870).

²*Mackay v. Commercial Bank*, L. R. 5 P. C. 394 (1874), in which a bank was held liable in damages for the act of its cashier in sending a telegram purporting to be from an individual by means of which other parties were induced to accept bills of exchange in which the bank was interested; *Ranger v. Great Western R'y*, 5 H. L. Cas. 72, 86 (1854), Lord Chancellor Cranworth saying: "If the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation;" *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259 (1867), where a bank was held liable for false representations of its manager as to the credit of an individual; *Erie City Iron Works v. Barber*, 106 Pa. St. 125 (1884), where a manufacturing company was held in damages for the deceit of its agent in knowingly selling a defective boiler and repre-

A corporation may be held liable in damages for a libel;¹ for assault and battery committed by its officers, agents or servants in executing the rules and regulations or orders of

senting it as sound and safe; *Peebles v. Patapsco Guano Co.*, 77 N. C. 233 (1877), involving representations of an agent that a spurious article was genuine; *Cragie v. Hadley*, 99 N. Y. 131 (1885), where, an officer of a bank receiving a deposit after he knew the bank was insolvent and its paper protested, it was held to be a deceit which justified a rescission of the contract and a recovery of the deposit; *New York, etc. R. R. v. Schuyler*, 34 N. Y. 30 (1865), involving an issue of false certificates of stock; *Butler v. Watkins*, 13 Wall. 456 (1871), where an agent of a corporation, by pretending to negotiate for the purchase of a patent, succeeded in keeping the patented article out of the market. The corporation was held liable in damages; *Candy v. Globe Rubber Co.*, 37 N. J. Eq. 175 (1883), where a sale to a corporation made upon false representations of its officers as to its solvency and prosperity was rescinded; *Fogg v. Griffin*, 84 Mass. 1 (1861), where, in an action upon premium notes, a defense that they had been procured through false and fraudulent representations by an agent of the company as to the amount of capital stock paid in was held good. See, also, *Etting v. Bank of U. S.*, 11 Wheat. 59 (1826); *Lamm v. Port Deposit Homestead Assoc.*, 49 Md. 233 (1878); *Carter v. Howe Machine Co.*, 51 Md. 290 (1878); *Western Bank v. Addie*, L. R. 1 Sc. 145 (1867), and §§ 139, 140, 157, *infra*.

¹ *Philadelphia, etc. R. R. v. Quigley*, 21 How. 202 (1858), in which the court held that the publication of a libelous letter received in evidence by a committee of investigation in a bound volume of its transactions, by authority of the board of directors

of a railroad company, constituted a sufficient ground for an action for libel against the corporation; *Van Aernam v. Bleistein*, 102 N. Y. 355 (1886); *Howe Machine Co. v. Souder*, 58 Ga. 64 (1877), where the publication of libelous matter was caused by an agent within the scope of his authority; *Maynard v. Fireman's, etc. Co.*, 34 Cal. 49 (1867); *S. C.*, 47 Cal. 207 (1873); *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 565 (1876); *Fogg v. Boston, etc. R. R.*, 148 Mass. 513 (1889); *Van Aernam v. McCune*, 32 Hun, 316 (1884), holding that a joint-stock association under the New York statute is liable to an action for libel; *Payne v. Western, etc. R. R.*, 13 Lea (Tenn.), 507 (1884); *Evening Journal Assoc. v. McDermott*, 44 N. J. L. 430 (1882); *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447 (1868); *Aldrich v. Press Printing Co.*, 9 Minn. 133 (1864); *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178 (1876); *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367 (1875); *Whitfield v. Southeastern R'y*, EL, B. & E. 115 (1858); *Tench v. Great Western R'y*, 32 U. C. Q. B. 452 (1872). In *Brennan v. Tracy*, 2 Mo. App. 540 (1876), it was said that a corporation may be subjected to a criminal libel. A railroad may be held liable for a libel by its division agent in reporting causes of discharge of employees to other agents. *Bacon v. Michigan Cent. R. R.*, 66 Mich. 166 (1887). A corporation is not liable for a slander by its president as to the right of a person to sell goods. *Perkins v. Maysville, etc. Assoc.*, 10 S. W. Rep. 659 (Ky., 1889). A corporation was held liable for a libel in *Missouri Pac. R'y v. Richmond*, 73 Tex. 568 (1889). Stockholders and officers are not liable for a libel published by the cor-

the corporation;¹ for damages for arrest and false imprisonment;² for knowingly keeping a dangerous animal;³ for a

poration unless they aided or advised its publication or their duties were such that the law would charge them as agents in the publication or circulation. *Belo v. Fuller*, 84 Tex. 450 (1892). A corporation may bring suit for libel. *South Hetton Coal Co. v. Northeastern News Assoc.*, 69 L. T. Rep. 844 (1893).

¹*Brokaw v. New Jersey R. R. & T. Co.*, 32 N. J. L. 328 (1867), for ejecting a passenger from a train, and in such action an individual may be joined as a defendant with the corporation; *Hewett v. Swift*, 85 Mass. 420 (1862), for using undue force in removing a minor from a freight depot under an order of the president directing employees to keep boys out of the depot; *Denver, etc. R'y v. Harris*, 122 U. S. 597 (1887), where forcible possession was taken of a railroad; *Ramsden v. Boston, etc. R. R.*, 104 Mass. 117 (1870), involving an assault by a conductor in seizing property to secure payment of fare. And see *Frost v. Domestic S. M. Co.*, 133 Mass. 563 (1882); *Jackson v. Second Ave. R. R.*, 47 N. Y. 274 (1872), holding that if an illegal fare be demanded by a conductor any force used in ejecting a passenger renders the railway company liable for an assault and battery; *Pennsylvania R. R. v. Vandiver*, 42 Pa. St. 365 (1862), for ejecting a passenger and thereby causing his death; *Moore v. Fitchburg R. R.*, 70 Mass. 465 (1855), where, in an action for assault in ejecting from a train, there being a verdict against the corporation but in favor of the conductor, the joinder of the defendants was held not to be a ground of exception by the corporation; *Chicago, etc. R. R. v. Williams*, 55 Ill. 185 (1870), for preventing a colored woman from entering a car set apart for ladies; *Jeffersonville R. R. v. Rogers*, 28 Ind.

1 (1867); *St. Louis, etc. R. R. v. Dalby*, 19 Ill. 353 (1857), holding that in Illinois the proper remedy is trespass.

²*Owsley v. Montgomery, etc. R. R.*, 37 Ala. 560 (1861); *Wheeler, etc. Co. v. Boyce*, 36 Kan. 350 (1887); *American Exp. Co. v. Patterson*, 73 Ind. 430 (1881); *Lynch v. Metropolitan El. R'y*, 90 N. Y. 77 (1882); *Carter v. Howe Machine Co.*, 51 Md. 290 (1878). See also *Hussey v. Norfolk Southern R. R.*, 98 N. C. 34 (1887), in which the question of agency was left to the jury. A corporation is not liable for an arrest by a special policeman appointed by the governor at its request and for its protection, even though the arrest was made at the request of an officer of the company, the policeman acting merely in the exercise of his common-law powers as an officer, and not as a duly authorized agent of the company. *Tolchester, etc. Co. v. Steinmeier*, 72 Md. 313 (1890). A corporation is not necessarily liable for a false imprisonment instigated by its state agent, where the plaintiff fails to show the agency, and the agent testifies that he acted individually. *Travis v. Standard, etc. Ins. Co.*, 86 Mich. 288 (1891). See also *Gillett v. Missouri Valley R. R.*, 55 Mo. 315 (1874), overruled in *Boogher v. Life Assoc.*, 75 Mo. 319 (1882). Although the gate-keeper of a turnpike company causes a person to be arrested for defrauding the company of tolls, yet the company cannot be held liable for false imprisonment. *Baltimore, etc. T. Road v. Green*, 37 Atl. Rep. 642 (Md., 1897). A bank may be held liable in damages for malicious intent in arresting an alderman who had introduced a privileged resolution which the bank claimed was libelous. *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426 (1893).

³*Stiles v. Cardiff Steam Nav. Co.*,

vexatious civil suit;¹ for trespass *quare clausum fregit*;² for malicious prosecution;³ for a nuisance;⁴ for conversion;⁵ and

33 L. J. Q. B. 310 (1864); but in this case the action failed for want of proof that the dangerous character of the animal was known to any one whose knowledge could, in point of law, be that of the corporation.

¹ *Goodspeed v. East Haddam Bank*, 22 Conn. 530 (1853); *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469 (1872). See 8 R'y & Corp. L. J. 478.

² *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452 (1842), where the trespass consisted in breaking and entering canal locks and carrying away barges by an agent acting within the scope of his authority. *Chicago, etc. R. R. v. Davis*, 86 Ill. 20 (1870); *Dater v. Troy, etc. R. R.*, 2 Hill, 629 (1842).

³ *Willard v. Holmes, etc.*, 142 N. Y. 492 (1894); *Vance v. Erie R'y*, 32 N. J. L. 334 (1867); *Reed v. Home Sav. Bank*, 130 Mass. 443 (1881); *Ricord v. Central Pacific R. R.*, 15 Nev. 167 (1880), holding that prosecution of criminal offenders is one of the objects and privileges of railroad corporations, and therefore they are liable for malicious prosecutions; *Morton v. Metropolitan L. Ins. Co.*, 34 Hun, 366 (1884); *Jordan v. Alabama, etc. R. R.*, 74 Ala. 85 (1883), overruling *Owsley v. Montgomery, etc. R. R.*, 37 Ala. 560 (1861); *Boogher v. Life Assoc. of America*, 75 Mo. 319 (1882), overruling *Gillett v. Missouri V. R. R.*, 55 Mo. 315 (1874); *Copley v. Grover, etc. Co.*, 2 Woods, 494 (1875); *S. C.*, 6 Fed. Cas. 517; *Carter v. Howe Machine Co.*, 51 Md. 290 (1878); *Williams v. Planters' Ins. Co.*, 57 Miss. 759 (1880); *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505 (1877). See also *Brennan v. Tracy*, 2 Mo. App. 540 (1876); *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 469 (1872); *Philadelphia, etc. R. R. v. Quigley*, 21 How. 202 (1853). In the English case of *Stevens v. Midland Counties R'y*, 10

Exch. 352 (1854), where the power to sue a corporation for malicious prosecution was questioned, Lord Alderson was of opinion that there was no such power. See *Walker v. Southeastern R'y*, L. R. 5 C. P. 640 (1870), where it was held that the action would not lie because the act out of which the case originated was not within the scope of the authority of the servant who committed it. And in *Henderson v. Midland R'y*, 20 W. R. 23 (1871), and *Abrath v. North-eastern R'y*, L. R. 11 App. Cas. 247 (1886), Lord Bramwell, in dissenting opinions, insisted that corporations aggregate cannot be liable for malicious prosecution, because they are incapable of malice or motive. In *Hussey v. Norfolk, etc. R. R.*, 98 N. C. 34 (1887), it was held that a corporation is liable for a malicious prosecution jointly with the officer who instituted the prosecution. No allegation of his authority to act is necessary. A corporation is not liable for malicious prosecution in instituting criminal proceedings where it acted on the advice of counsel. *Atchison, etc. R. R. v. Brown*, 57 Kan. 785 (1897).

⁴ *Baltimore, etc. R. R. v. Fifth Baptist Ch.*, 108 U. S. 317 (1883); *Pennsylvania R. R. v. Angel*, 41 N. J. Eq. 316 (1886). "The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted" for a nuisance carried on by the corporation. The corporation itself can also be prosecuted and fined. *People v. Detroit, etc. Works*, 82 Mich. 471 (1890).

⁵ *Beach v. Fulton Bank*, 7 Cow. 485 (1827); *Mayor, etc. v. Bailey*, 2 Denio, 433 (1845), holding that an action of trespass or trover or an action on the case for malfeasance lies against a corporation; *Chestnut Hill, etc. Co. v. Rutter*, 4 Serg. & R. (Pa.) 6 (1818),

for a conspiracy.¹ The theory that a corporation could not be technically thus liable has broken down.

Upon the question whether or not corporations are liable in exemplary or punitive damages for wrongs maliciously committed by their agents when acting in the line of their duty, the authorities are far from uniform. In one line of cases the courts adhere to the ordinary rule that a principal cannot be held for more than the actual damage resulting from the acts of his agent or for those immediately and necessarily growing out of them, and therefore refuse to allow exemplary damages.² In other cases it is held that if it appears that injury has resulted through the wilful misconduct of employees, or through such a reckless indifference to the rights of others as amounts to an intentional violation of them, punitive or exemplary damages may be awarded.³ In still another class of cases the liability

holding that trespass on the case lies against a corporation for stopping a water-course. See also ch. XXXV.

¹ *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669 (1887); 42 Hun, 153. Where a bank agrees with a partnership that the partnership shall buy goods and give a chattel mortgage to the bank, and then that the bank foreclose and resell the goods and give two-thirds of the profits to the copartnership, a creditor of the partnership who is thus defrauded may hold the bank liable. *Johnston, etc. Co. v. National Bank*, 44 Pac. Rep. 192 (Okla., 1896).

² *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447 (1868); *Great Western R'y v. Miller*, 19 Mich. 305 (1869); *Wardrobe v. California Stage Co.*, 7 Cal. 118 (1857); *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657 (1871); *Turner v. North Beach, etc. R. R.*, 34 Cal. 594 (1868); *Hill v. New Orleans, etc. R. R.*, 11 La. Ann. 292 (1856); *Hays v. Houston, etc. R. R.*, 46 Tex. 272 (1876); *Ackerson v. Erie R'y*, 32 N. J. L. 254 (1867); *Doss v. Missouri, etc. R. R.*, 59 Mo. 27 (1875), holding that no exemplary damages may be awarded unless the act complained of be wanton or malicious. In a suit

against a corporation for libel its wealth cannot be shown, and the malice of a stockholder is not admissible. *Randall v. Evening News Assoc.*, 97 Mich. 136 (1893).

³ *Denver, etc. R'y v. Harris*, 122 U. S. 597, 610 (1887); *Milwaukee, etc. R'y v. Arms*, 91 U. S. 489, 493 (1875); *Philadelphia, etc. R. R. v. Larkin*, 47 Md. 155 (1877); *Baltimore, etc. Turnp. Rd. v. Boone*, 45 Md. 344 (1876); *Philadelphia, etc. R. R. v. Quigley*, 21 How. 202, 214 (1858); *New Orleans, etc. R. R. v. Hurst*, 36 Miss. 660 (1859); *Beale v. Railway*, 1 Dill 568 (1871); S. C., 2 Fed. Cas. 1110; *Samuels v. Evening Mail Assoc.*, 75 N. Y. 604 (1878), reversing S. C., 9 Hun, 288 (1876), where a libel had been published; *New Orleans, etc. R. R. v. Burke*, 53 Miss. 200 (1876), where the conduct of the conductor of a train in not properly protecting a passenger from the assault of employees of the road and the failure of the road to discharge or punish the assailants was held to justify a verdict for exemplary damages; *Jeffersonville R. R. v. Rogers*, 38 Ind. 116 (1871), it being held that exemplary damages may be awarded for a wrongful expulsion from a train without harsh

for exemplary damages is made to depend upon the authority of the servant or agent who commits the wrong; the corporation being liable if the agent acted under the express direction of the corporation or of the officer representing it, or if the wrongful act was afterwards ratified either expressly or impliedly.¹

Since corporations are not in themselves capable of an evil intent, they can be indicted only for such offenses as arise from misfeasance—such as a nuisance;² or from non-feasance—

or unnecessary force, on account of the time, place and circumstances of the act; *Goddard v. Grand Trunk R'y*, 57 Me. 202 (1869), where exemplary damages were awarded because a railroad company had retained in service a brakeman after knowledge of his gross assault upon a passenger; *Taylor v. Grand Trunk R'y*, 48 N. H. 304 (1869); *Belknap v. Boston, etc. R. R.*, 49 N. H. 358 (1870), holding that in estimating exemplary damages the condition and circumstances of the *defendant* may be material and are to be considered; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282 (1872); *Cleghorn v. New York, etc. R. R.*, 56 N. Y. 44 (1874).

¹*Hagan v. Providence, etc. R. R.*, 3 R. I. 88 (1854); *Nashville, etc. R. R. v. Starnes*, 9 Heisk. (Tenn.) 52 (1871), where exemplary damages were refused because it did not appear that the company, after knowing the reckless character of its agent, retained him in its employment; *Bass v. Chicago, etc. R'y*, 42 Wis. 654 (1877); *Cleghorn v. New York, etc. R. R.*, 56 N. Y. 44 (1874); *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657 (1871); *Turner v. North Beach, etc. R. R.*, 34 Cal. 594 (1868); *Perkins v. Missouri, etc. R. R.*, 55 Mo. 201 (1874); *Malecek v. Tower Grove, etc. R'y*, 57 Mo. 17 (1874), where the language of the superintendent of a street railway admitting and justifying an assault by a driver was held to bind the company; *Travers v. Kansas Pac. R'y*, 63 Mo. 421 (1876), holding that authority of the

agent sufficient to warrant exemplary damages may be inferred from the general scope of his duty; *Galveston, etc. R'y v. Donahue*, 56 Tex. 162 (1882); *Goddard v. Grand Trunk R'y*, 57 Me. 202 (1869). See, also, *Ackerson v. Erie R'y*, 32 N. J. L. 254 (1867). In some states the distinction between corporations and natural persons as to liability for exemplary damages is entirely obliterated, and corporations are held to be equally liable with individuals and to the same extent. *New Orleans, etc. R. R. v. Bailey*, 40 Miss. 395 (1866); *Atlantic, etc. R'y v. Dunn*, 19 Ohio St. 162 (1869); *Western Union Tel. Co. v. Eyser*, 2 Colo. 141 (1873).

²*Commonwealth v. New Bedford Bridge*, 68 Mass. 339 (1854), erecting a bridge over a navigable stream; *Commonwealth v. Vermont, etc. R. R.*, 70 Mass. 22 (1855), obstructing a highway by embankment; *State v. Morris, etc. R. R.*, 23 N. J. L. 360 (1852), obstructing a highway by a building and trains; *Louisville, etc. R. R. v. State*, 3 Head (Tenn.), 523 (1859), obstruction by a cut across a street; *Susquehanna, etc. Co. v. People*, 15 Wend. 267 (1836), suffering a turnpike to be and remain out of repair; *People v. Albany*, 11 Wend. 539 (1834), neglecting to excavate and cleanse a basin, whereby the water became corrupted and a nuisance; *Regina v. Great North, etc. R'y*, 9 Q. B. 315 (1846), obstruction by a cut across a highway; *Queen v. Bradford Nav. Co.*, 6 Best & S. 631 (1865), permitting

such as an omission to perform a legal duty or obligation.¹ "The corporation as such, the technical legal entity, cannot suffer imprisonment for a crime, but those who represent it and act for it as its officers and agents can."²

water in a canal to become foul. *Contra*, *State v. Great Works Milling Co.*, 20 Me. 41 (1841). A corporation may be indicted for keeping a disorderly house. *State v. Passaic, etc. Soc.*, 54 N. J. L. 260 (1892). A corporation may be indicted for an offense which is punishable by fine. *Commonwealth v. Pulaski County, etc. Assoc.*, 92 Ky. 197 (1891). A corporation may be indicted. *State v. Security Bank*, 2 S. D. 538 (1892). A corporation may be indicted for maintaining a nuisance, and judgment may be given on default. *Commonwealth v. Lehigh Valley R. R.*, 165 Pa. St. 162 (1895). As to the indictment of a corporation in Indiana for maintaining a nuisance, see *Paragon Paper Co. v. State*, 49 N. E. Rep. 600 (Ind., 1898).

¹ A national bank may be indicted for violating the state usury laws. *State v. First Nat. Bank*, 2 S. D. 568 (1892). An indictment of the directors of the New York & New Haven R. R. Co. for an accident due to not using steam heat in cars as required by statute failed in *People v. Clark*, N. Y. L. J., May 28, 1891; *Commonwealth v. Central Bridge Corp.*, 66 Mass. 242 (1853), for not keeping a bridge properly lighted at night, its charter requiring it to be kept in "good, safe and passable repair;" *Louisville, etc. R. R. v. Commonwealth*, 13 Bush (Ky.), 388 (1877), involving a failure to give warning signals at highway crossings; *Regina v. Manchester*, 7 EL. & B. 453 (1857), where there was a failure of a city to repair streets; *State v. Murfreesboro*, 11 Humph. (Tenn.) 217 (1850), to same effect; *People v. New York, etc. R. R.*, 74 N. Y. 302 (1878), sustaining an indictment for failure to repair a high-

way; *Susquehanna, etc. Co. v. People*, 15 Wend. 267 (1836), for failure to repair a plank-road. An indictment lies against a turnpike company for failure to repair its road. *State v. Godwinsville, etc. Co.*, 49 N. J. L. 266 (1887); *Mower v. Leicester*, 9 Mass. 247 (1812), holding that an indictment may lie when there is no action at common law for damages sustained through defects in a highway. In *Brennan v. Tracy*, 2 Mo. App. 540 (1876), it was said that a corporation may be the subject of a criminal libel. It has been held that a statute subjecting railroads to indictment and fine for loss of life on account of the negligence or carelessness of the proprietors or their servants is constitutional. *Boston, etc. R. R. v. State*, 32 N. H. 215 (1855). A corporation may be indicted for failing to use revenue stamps. *U. S. v. Baltimore, etc. R. R.*, 7 Am. L. Reg. (N. S.) 757 (1868); *S. C.*, 24 Fed. Cas. 972. A corporation cannot be indicted for a crime, but its particular members may be. *Anonymous*, 12 Mod. 559 (1701). A corporation may be indicted. See 4 Am. & Eng. Encyc. of Law, pp. 267, etc. A corporation may be enjoined from doing criminal acts, such as promoting prize-fighting, and a receiver may be put in. *Columbian Ath. Club v. State*, 143 Ind. 98 (1895).

² *People v. Sherman*, 133 N. Y. 349, 354 (1892). Where the law permits punishment or confiscation of property, but not both, the conviction of a stockholder for violation of the internal revenue law prevents a confiscation of the corporate property. *U. S. v. Distillery*, 43 Fed. Rep. 846 (1890). As to crime, cf. *U. S. v. John-Kelso Co.*, 86 Fed. Rep. 304 (1898).

CHAPTER II.

STOCK MAY BE ISSUED LEGALLY FOR MONEY OR PROPERTY, OR BY A STOCK DIVIDEND.

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| <p>§ 16. Different methods of issuing stock.</p> <p>17. First method: Issue by money subscription.</p> <p>18. Second method: Issue for property, labor or construction work.</p> <p>19. When such subscriptions are not legal.</p> <p>20. What property may be received.</p> <p>21. Payment in property as a favor, not as a contract right.</p> <p>22. Sale of stock for property.</p> | <p>§ 23. English statutes governing issue of stock for property.</p> <p>24. Performance of contract to pay in property—Obligation of the corporation to issue the stock.</p> <p>25. Third method: Issue by stock dividend.</p> <p>26. Pledge of stock by a corporation.</p> <p>27. Issue of stock for partnership property, or the property of another corporation.</p> |
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§ 16. *Methods of issuing stock.*—There are in general three methods of issuing stock. It may be issued, first, by means of subscriptions, payable in cash, the subscription being made in writing, or by acts equivalent thereto.¹ Second, the issue may be by means of subscriptions, payable in labor, property, or both. Third, the issue may be by a stock dividend.

§ 17. *First method: Issue by money subscription.*—An issue of stock by means of a subscription, payable in cash, is the most simple and safe method of issuing stock. In the absence of any agreement to the contrary, an ordinary subscription for stock is deemed a cash subscription, and payment in money may be enforced. The subscription contract is generally made by a writing duly signed by the subscriber. The writing itself is contained in books opened by the corporation or by commissioners appointed in conformity with a statute, or it is made without formality on subscription lists or separate sheets of paper.

A subscription, payable in cash, may arise also from the mere acts or declarations of a party. A person having assumed the position of a subscriber or stockholder is frequently held to be bound as such. Any act or declaration, sufficient to indicate an intent on the part of the person to be a sub-

¹ See ch. IV, *infra*.

scriber, and an acceptance by the corporation of the person as such, is equivalent to a written subscription, and the person is bound as a subscriber.¹

§ 18. *Second method: Issue for property, labor or construction work.*—The issue of stock for labor, property, contract work, or any valuable consideration other than money, has given rise to much controversy and litigation. In England a long line of decisions, under the Companies Act, has established the principle that stock need not necessarily be paid for in cash, but that it may be paid for in money's worth.² Such, also, was the rule at common law.³ The well-established rule

¹See ch. IV, *infra*.

²See many cases in ch. III; *Steady v. Little Rock, etc. R. R.*, 5 Dill. 348, 376 (1876); *S. C.*, 22 Fed. Cas. 1142, 1153.

³Stock may be issued in payment for property or labor, or both. *Farwell v. Great West. Tel. Co.*, 161 Ill. 522 (1896); *Woolfolk v. January*, 131 Mo. 620 (1895); *Foster v. Belcher's, etc. Co.*, 118 Mo. 238 (1893); *Woodfall's Case*, 3 De G. & Sm. 63 (1849); *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1004, 1012 (1878), where, payment having been made in property, the court said: "If there had been no statutory enactment forbidding a transaction of that kind, it is a transaction which might be perfectly valid." *Cf. dictum* in *Sanger v. Upton*, 91 U. S. 56, 60 (1875). "It is not now questioned that a corporation may issue its stock by way of payment in the purchase of property. This is on the principle that there is no need for the roundabout process of first issuing the stock for money, and then paying the money for the property. But it is necessary that the property so taken be considered reasonably worth the par value of the stock paid for it." *Chouteau v. Dean*, 7 Mo. App. 210 (1879); *Wyman v. American Powder Co.*, 62 Mass. 168 (1851); *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883); *Hayden v. Atlanta*

Cotton Factory, 61 Ga. 233 (1878).

"Whatever may have been formerly held, it is now established that subscriptions to corporate stock need not, in the absence of statutory provisions requiring it, be paid for in cash. The principle is now generally accepted, both in England and America, that any property which the corporation is authorized to purchase, or which is necessary for the purposes of its legitimate business, may be received in payment for its stock. Any payment, whether it be in money or money's worth, so that it be made in good faith, will give the shares so paid for the *status* of paid-up stock. In the language of Lord Justice Giffard, in *Drummond's Case*, L. R. 4 Ch. App. 772 (1869): 'If a man contracts to take shares he must pay for them, to use a homely phrase, in meal or in malt; he must either pay in money or in money's worth. If he pays in one or the other that will be a satisfaction.' . . . The contract to receive in payment the letters-patent, plows, material, and other assets of its predecessor, *Unthank & Coffin*, was therefore not *ultra vires*." *Coffin v. Ransdell*, 110 Ind. 417 (1887), holding, also, that payment for stock by transferring to the corporation the property and assets of a partnership was legal, provided that a fair valuation was placed upon

now is that a subscription for stock, payable by its terms in property or labor, or both, is a good and legal subscription. If the property is taken at a valuation made without fraud, the payment is as effectual and valid as though made in cash to the same amount. An issue of stock for property is one which finds support, not only in the decisions, but in the daily transactions of corporations,¹ and the law does not compel the corporation and the subscriber to go through the useless form of a payment by the corporation to the subscriber of the value of the property, and an immediate repayment of the same money by the subscriber to the corporation on his subscription.²

There is some doubt as to whether an oral agreement of the corporate agents that a subscription may be paid in property is binding upon the corporation. Under the well-established rule that parol evidence will not be allowed to add to or vary a written agreement, it has been held that such an oral agreement with the agent cannot be admitted in evidence.³ When, however, the parol agreement is made subsequently to the act of subscribing, and is supported by a sufficient consideration, it is valid and enforceable.⁴

§ 19. *When such subscriptions are not legal.*—A subscription payable by its terms in labor or property is in the nature of a conditional subscription. Accordingly, in certain states, where

the property so conveyed. If such property is overvalued, the dangers incurred thereby are various. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330 (1892), approving the above statement of law. See also ch. III.

¹ *Foreman v. Bigelow*, 4 Cliff. 508, 544 (1878); S. C., 9 Fed. Cas. 427, 441.

² *Searight v. Payne*, 6 Lea (Tenn.), 233 (1880); *Brant v. Ehlen*, 59 Md. 1 (1882); *Spargo's Case*, L. R. 8 Ch. App. 407, 412 (1873); *Ashuelot Boot, etc. Co. v. Hoit*, 56 N. H. 548 (1876). Payment in property by subscribers was held not allowable in *Neuse River Nav. Co. v. Com'rs of Newbern*, 7 Jones, L. (N. C.) 275 (1859); also *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1843), although the latter case seems to involve an oral agreement to allow such payment, and to have been de-

cided on that ground. There is a long line of cases sustaining the validity of an issue of stock for money's worth instead of money itself. They are given in this and the following chapter. So well established has this principle of law become that the few cases holding to the contrary can no longer be considered good law. "That in the absence of fraud an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines or other property, to which it is not easy to assign a determinate value, appears to be well settled." *New Haven, etc. Co. v. Linden Spring Co.*, 142 Mass. 349 (1886).

³ See § 137, *infra*.

⁴ *Id.*

a percentage or fixed amount of the capital stock must be subscribed for before a charter can be obtained, and where, by the decisions of the courts, such preliminary subscriptions must be absolute and unconditional, a subscription payable by its terms in labor or property, being conditional to that extent, cannot form a part of the preliminary subscription.¹ In such states, however, subscriptions to the remainder of the capital stock, the part subscribed after the charter has been or may be obtained, may be conditional, and may, by their terms, be payable in property or labor.² On the ground that subscriptions payable in property or labor are conditional, it has been held also that a subscription payable in labor or property is not to be counted in ascertaining whether the full capital stock has been subscribed,³ in order to enforce subscriptions for stock. An *ultra vires* purchase of property may also be insufficient as a consideration for the issue of stock.⁴

§ 20. *What property may be received.*—A corporation may receive in payment of its shares of stock any property which it may lawfully purchase,⁵ and, in general, may receive any consideration which is suitable and applicable to the purposes for which the corporation was organized.⁶ A railroad corporation

¹ See §§ 79, 180, *infra*.

² See § 82, *infra*.

³ See § 180, *infra*.

⁴ In *Powell v. Murray*, 3 N. Y. App. Div. 273 (1896), where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon under the New York statute as not being paid-up stock, such contract being *ultra vires*.

⁵ *Brant v. Ehlen*, 59 Md. 1 (1882); *American Silk Works v. Salomon*, 4 Hun, 135 (1875).

In Louisiana the general act for incorporation prescribes that the articles of incorporation shall state the time when and the manner in which the stock shall be paid for. See *New Orleans, etc. R. R. v. Frank*, 39 La. Ann. 707 (1887).

⁶ See Green's *Brice's Ultra Vires* (2d ed.), 145; *Angell & Ames* (11th ed.), § 517. "Payment of stock subscriptions need not be in cash, but may be in whatever, considering the situation of the corporation, represents to that corporation a fair, just, lawful, and needed equivalent for the money subscribed." *Liebke v. Knapp*, 79 Mo. 22 (1883). Payment in newspaper advertising of the enterprise upheld in this case. The subscription may, by its terms, be payable in plank for a plank-road company, and the subscriber is a stockholder before payment is completed. *Haywood, etc. Co. v. Bryan*, 6 Jones, L. (N. C.) 82 (1858). Payment in Confederate bonds redeemable in cotton upheld. *Schroder's Case*, L. R. 11 Eq. Cas. 131 (1870). So, also, payment in stock in a coal corporation carrying on a supplementary business. *East New York, etc. R. R. v.*

may receive payment in contract work, in right of way, or in any kind of material or labor applicable to its construction.¹ A manufacturing corporation may receive payment in the goodwill of a business or the stock in trade.² Land may be taken in payment when the corporation would be allowed to purchase the same.³ Promissory notes may also be taken, under

Lighthall, 6 Rob. (N. Y.) 407 (1868). Payment by a patent-right has been upheld. *Edwards v. Bringier Sugar Extracting Co.*, 27 La. Ann. 118 (1875); and in another case, under a statute not upheld. *Tasker v. Wallace*, 6 Daly, 364 (1876). Payment may be by canceling a debt of the company past due. *Carr v. Le Fevre*, 27 Pa. St. 413 (1856). Or not yet due. *Apple-yard's Case*, 49 L. J. (Ch.) 290 (1880). A company may issue stock in exchange for bonds of another corporation where the former corporation owns the equity of the property, subject to the mortgage securing the bonds. *Beebe v. Richmond, etc. Co.*, 3 N. Y. App. Div. 334 (1896). Payment, however, to a bank in its own currency was not upheld, it being statutory that only specie could be received. *King v. Elliott*, 13 Miss. 428 (1845). Payment by check cannot be objected to by another subscriber. *Thorp v. Woodhull*, 1 Sandf. Ch. 411 (1844). Stock may be issued to the president in payment of past salary and debts. *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); *aff'd*, 109 N. Y. 659.

¹ "We can see no objection whatever to a railroad company issuing stock and taking in payment materials or labor or land necessary for its road." *Clark v. Farrington*, 11 Wis. 306 (1860). As to payment in stock for construction work, see also *Wood, Railways*, § 282. "The corporation had a right to accept payment of stock in labor or materials, in damages which the company were liable to pay, or in any other liability of the company, provided these trans-

actions were entered into and carried out in good faith." *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857); *Bedford County v. Nashville, etc. R'y*, 14 Lea (Tenn.), 525 (1884), holding, also, that thirty years' delay in demanding the stock is no bar to the right. To the same effect, payment being in services, *Kobogum v. Jackson Iron Co.*, 76 Mich. 498 (1889). Payment may be in cross-ties. *Ohio, etc. R. R. v. Cramer*, 23 Ind. 490 (1864). Or in real estate and services. *Cincinnati, etc. R. R. v. Clarkson*, 7 Ind. 595 (1856). Or in services and materials. *Phillips v. Covington Bridge Co.*, 2 Metc. (Ky.) 219 (1859). Or by construction of the road. See § 18. One railroad having power to consolidate with another may, in payment therefor, issue stock to the contractors who are constructing the latter. *Branch v. Jesup*, 106 U. S. 468 (1882). A corporation may agree to give \$5,000 of stock to one who will borrow \$15,000 for it. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889). A contract that subscriptions shall be payable in land is illegal by statute in Alabama, but after subscription payment in land may be allowed. *Knox v. Childersburg Land Co.*, 86 Ala. 180 (1888).

² *Pell's Case*, L. R. 5 Ch. App. 11 (1869). Stock may be issued for the goodwill of a business, and a person who has taken part in the transaction cannot afterwards complain. *Washburn v. National, etc. Co.*, 81 Fed. Rep. 17 (1897).

³ *Goodin v. Evans*, 18 Ohio St. 150 (1868); *Cincinnati, etc. R. R. v. Clarkson*, 7 Ind. 595 (1856); *Peck v. Coal-*

the corporate power to give credit and extend the time of payment of debts.¹ Fully paid-up stock may be issued by an irrigation company in payment for pipe lines, wells and ditches.² It is legal for a corporation to issue stock as fully paid to a person in consideration of his leaving an employment in which he is engaged and of assuming the presidency of the corporation.³

§ 21. *Payment in property as a favor, not as a contract right.*—There is an important distinction to be made between

field Coal Co., 11 Bradw. (Ill.) 88 (1882); Brant v. Ehlen, 59 Md. 1 (1882); Jones's Case, L. R. 6 Ch. App. 48 (1870); Maynard's Case, L. R. 9 Ch. App. 60 (1873); Dayton, etc. R. R. v. Hatch, 1 Disney (Ohio), 84 (1855); Carr v. Le Fevre, 27 Pa. St. 413 (1856); Lohman v. N. Y. & Erie R. R., 2 Sandf. Super. Ct. 39 (1848). In Foreman v. Bigelow, 4 Cliff. 508, 544 (1873), S. C., 9 Fed. Cas. 427, 441, the court say: "Argument to show that the transaction of issuing the stock in payment for the mineral land would have been valid . . . is scarcely necessary." In Indiana formal acceptance by the directors is necessary. State v. Bailey, 16 Ind. 46 (1861); Junction R. R. v. Reeve, 15 Ind. 236 (1860). A corporation receiving a deed of land in payment of stock subscription is protected in its title to the land the same as any other *bona fide* purchaser of it would be against a former vendor's lien for the purchase-money. Frenkel v. Hudson, 32 Ala. 158 (1887).

¹Stoddard v. Shetucket Foundry Co., 34 Conn. 542 (1868); Ogdensburgh, etc. R. R. v. Wooley, 3 Abb. Ct. of App. Dec. 398 (1864); Magee v. Badger, 30 Barb. 246 (1859); Goodrich v. Reynolds, 31 Ill. 490 (1863); Vermont Central R. R. v. Clayes, 21 Vt. 30 (1848); Hardy v. Merriweather, 14 Ind. 203 (1860); Pacific Trust Co. v. Dorsey, 72 Cal. 55 (1887). In Wisconsin a corporation may accept in payment of stock a note secured by a mortgage on real estate. Clark v. Farrington, 11 Wis. 306 (1860); Blunt v. Walker,

11 Wis. 334 (1860); Cornell v. Hichens, 11 Wis. 353 (1860); Lyon v. Ewings, 17 Wis. 61 (1863); Andrews v. Hart, 17 Wis. 297 (1863); Western Bank of Scotland v. Tallman, 17 Wis. 530 (1863). In Tennessee payment in notes is not upheld, but the subscriber is to be credited with the amount collected on such notes. Moses v. Ocoee Bank, 1 Lea (Tenn.), 398 (1878). In New York the payment of a subscription by one's own note is prohibited by statute. See § 973, *infra*. Payment by bond and mortgage was upheld in Valk v. Crandall, 1 Sandf. Ch. 179 (1843), and in Leavitt v. Pell, 27 Barb. 322 (1858). As to payment by note, see §§ 172-175, *infra*. But a worthless note is not payment so far as corporate creditors are concerned. Bouton v. Dement, 123 Ill. 142 (1887). A company authorized by statute to sell stock for cash may sell it for the bonds of the vendee, and may enforce the bonds. Southern Life Ins. Co. v. Lanier, 5 Fla. 110 (1853). Subscriptions may be paid by notes, especially where the corporation sells the notes. Rouse, etc. Co. v. Detroit, etc. Co., 69 N. W. Rep. 511 (Mich., 1896). A note given in payment for a subscription does not bear interest unless the note itself so provides, especially where no call on the subscription has been made. Seattle T. Co. v. Pitner, 51 Pac. Rep. 1048 (Wash., 1898).

²Loud v. Pomona, etc. Co., 155 U. S. 564, 582 (1894).

³Shannon v. Stevenson, 173 Pa. St. 419 (1896).

payments in property, where the subscription itself, by its terms, allows such payment, and a payment in property, which is allowed, as a matter of favor, by the corporation, the subscription itself being silent as to the mode of payment.¹ The latter class of transactions has been uniformly upheld, except when positively prohibited by statute, and payment has even been held to be valid, although the statute required it to be in money or in cash.² A subscription is payable in cash unless there is a contract by which it is to be paid in labor or property.³ Where a person subscribes for stock and afterwards payment is made in property at a gross overvaluation, the court may hold him liable for the difference between the actual value of the property and the par value of the stock, even though the company

¹Many of the cases which apparently are cases of subscriptions, wherein the subscriber has expressly stipulated that he may pay in property or labor, will be found, on close examination, to be absolute subscriptions payable in cash. Afterwards the corporation, although not obliged so to do, accepts property or labor instead of the cash. This kind of transaction is almost universally upheld by the courts when entered into and carried out in good faith. Such payment is upheld even in opposition to the express terms of a statute requiring payment in cash. See § 23. Many of the American cases, also, are plainly cases in which payment in property was allowed by the corporation, not as a right but as a matter of favor. The courts uphold such agreements because they are similar to offsets of accounts, and the delays, uncertainties, special privileges, and other objections to subscriptions payable in terms in property and labor are obviated. See *Ashuelot Boot, etc. Co. v. Hoit*, 56 N. H. 548 (1876); *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542 (1868), where the court say, "that the defendants could have insisted upon the plaintiff's payment for his stock in cash is unquestion-

able." See, also, *Vermont Central R. R. v. Clayes*, 21 Vt. 30 (1848); *Boston, etc. R. R. v. Wellington*, 113 Mass. 79 (1873). A subscription may be made and then by another contract be paid by a lease of a railroad. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). Railroad corporations must require payment in cash of a certain percentage of the subscription at the time of subscribing. See § 963, *infra*. Even here, however, the courts hold that the ten per cent. may be paid by property actually received. *Beach v. Smith*, 30 N. Y. 116 (1864), where payment was by services rendered. The court said: "Was it necessary, for any purpose, that the ceremony of paying money by the company to the defendant, and by the defendant of the same money back again, should be gone through with? It seems to me not."

²See p. 80, note 2.

³*Farwell v. Great West. Tel. Co.*, 161 Ill. 522 (1896). A subscriber for one share of stock is liable thereon although afterwards a contractor to whom stock is issued for property transfers to the former one full-paid share of stock to fulfill the subscription. *Dalton, etc. Co. v. Dalton*, 66 L. T. Rep. 704 (1892).

went through the form of canceling the subscription and issuing the stock as an original issue for property.¹

§ 22. *Sale of stock for property.*—The issue of stock for property, labor or contract work need not necessarily be accompanied with the formality of a subscription.² Frequently the issue is spoken of as a sale of the stock for the property received in payment. Sometimes the issue is by means of a contract, whereby, upon the completion of certain work, the party is to be entitled to the stock. The New York court of appeals stated the law clearly when it said, in respect to such issues, that “the right of the officers of a railroad corporation to enter into an agreement to build its road and pay for the construction of the same in stock or bonds cannot be seriously questioned, and contracts of this description are frequently made for such a purpose.”³

It is doubtful, however, whether any clearness of ideas is obtained, under any circumstances, by calling an original issue of stock a sale of stock. Such a transaction is not a sale of stock. A sale of stock means a transfer of stock after the stock has been issued, or an agreement to transfer the same. Such original issues of stock as are occasionally spoken of as being sales of stock might better be considered as informal subscriptions arising by the acts or declarations of the parties, and payable in property by the terms of the contract.⁴

¹ *Hebberd v. Southwestern, etc. Co.*, 36 Atl. Rep. 122 (N. J., 1896).

² A charter provision authorizing the opening of stock subscription books does not amount to a prohibition against any other mode of becoming a stockholder. “If a railroad company could sell its stock for the right of way, for lands for depot purposes, for iron, or anything essential to the accomplishment of its purpose, it might do so.” It is a legal issue of stock without subscription. *Western Bank of Scotland v. Tallman*, 17 Wis. 530 (1863). See, also, *Clark v. Farrington*, 11 Wis. 306 (1860); *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); *aff’d*, 109 N. Y. 659. In *Jackson v. Traer*, 64 Iowa, 469 (1884), stock having been issued in payment of contract work, the court said: “We have seen no

case which recognizes a difference between those stockholders who become such in pursuance of a written agreement and those who become such by the mere acceptance of stock issued to them.”

³ *Van Cott v. Van Brunt*, 82 N. Y. 535 (1880). See also *Eppes v. Mississippi, etc. R. R.*, 35 Ala. 33 (1859); *Boody v. Rutland, etc. R. R.*, 3 Blatchf. 25 (1853); S. C., 3 Fed. Cas. 857; S. C., 24 Vt. 660; *Troy, etc. R. R. v. Newton*, 74 Mass. 596 (1857); *McMahon v. New York, etc. R. R.*, 20 N. Y. 463 (1859), construing such a contract. An agreement to buy stock was held to be a subscription to stock in *Lincoln, etc. Co. v. Sheldon*, 44 Neb. 279 (1895).

⁴ See *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. St. 295 (1868); *St. Paul*,

§ 23. *English statutes on issues of stock for property.*—In England the payment for stock in property, labor or contract work is regulated largely by act of parliament. The statute requires that payment shall be in cash, unless the contract allowing payment in property is registered at a specified public registry.¹ Nevertheless, even where no registry is made, the courts have held that a payment in property is equivalent to a payment in cash, where the property has been actually delivered.² Such a payment in property, however, is as a mat-

etc. *R. R. v. Robbins*, 23 Minn. 439 (1877); *Clark v. Continental Improvement Co.*, 57 Ind. 135 (1877). In the case of *Seymour v. Jefferson*, 74 N. W. Rep. 149 (Minn., 1898), the court held that a contract to take stock from the corporation was a subscription and not a sale of stock. In the case of *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518 (1897), the court held that a sale of stock was an executory contract to take the stock, and that a tender of the certificate might be necessary before suit.

¹ Companies Act, Amendment 1867, 30 and 31 Vict., ch. 131, § 25.

² Under this statute three classes of cases of unregistered contracts arise: First, where payment is actually made in property, if fairly made, it is upheld, under the principles laid down in section 16. See *Jones' Case*, L. R. 6 Ch. App. 48 (1870); *Maynard's Case*, L. R. 9 Ch. App. 60 (1873); payment by colliery, *Re Baglan Hall Colliery Co.*, L. R. 5 Ch. App. 346 (1870); *Drummond's Case*, L. R. 4 Ch. App. 772 (1869); *Schroder's Case*, L. R. 11 Eq. Cas. 131 (1870); *Pell's Case*, L. R. 5 Ch. 11 (1869); by services, *Ex parte Clarke*, L. R. 7 Eq. 550 (1869). The amounts on each side must be payable presently and in cash. *Fothergill's Case*, L. R. 8 Ch. App. 270 (1873); so that the transaction is in the nature of a set-off. *Forbes's Case*, L. R. 5 Ch. App. 270 (1870); *Re Johannesburg Hotel Co.*,

[1891] 1 Ch. 119. Conveyance of a lease held to be a good payment. *Spargo's Case*, L. R. 8 Ch. App. 407 (1873). Where the parties fail to register their contract as required, by law, they are liable on the stock to the full par value thereof in cash, but may set off a debt due to them from the company. *Re Johannesburg Hotel Co.*, 64 L. T. Rep. 61 (1890), following *Spargo's Case*. A second class of unregistered agreements to take pay in property turn upon the question whether the agreement that payment shall be in property is a condition precedent or subsequent to the subscription. If the condition is precedent, and must be performed before the subscription can be enforced, none of the parties are bound, even though the corporation becomes insolvent. *Pellatt's Case*, L. R. 2 Ch. App. 527 (1867); *Stace's Case*, L. R. 4 Ch. App. 682 (1869); *Simpson's Case*, L. R. 4 Ch. App. 184 (1869). The third class is where the contract to pay in property is construed to be a condition subsequent. The condition being subsequent the party must pay; and if the corporation becomes insolvent, he must pay in cash. *Elkington's Case*, L. R. 2 Ch. App. 511 (1867); *Bridger's Case*, L. R. 5 Ch. App. 305 (1870); *Thomson's Case*, 34 L. J. (Ch.) 525 (1865); *Re Southport, etc. Banking Co.*, L. R. 31 Ch. D. 121 (1885). See also § 78.

ter of favor, and not as a matter of right.¹ It is to be distinguished from the payment in property which the subscriber may not yet have made, but has a right to make in the future. The one is an executed contract. The other may still be an executory contract.

§ 24. *Performance of contract of payment in property—Obligation of the corporation to issue the stock.*—Subscriptions payable in property are not subject to calls, and a demand for the property must be made by the corporation.² Upon failure of the subscriber to furnish the property, or upon insolvency of the corporation, such subscriptions become payable in cash.³ A payment of part of the subscription in cash does not waive the right of the subscriber to pay the balance in property.⁴

The stock may be issued to a contractor before his work in payment therefor has been completed.⁵ If the corporation prevents the completion of the contract or refuses to fulfill, the contractor may hold it liable for damages or may have specific performance.⁶ The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.⁷

§ 25. *Third method of issue: By stock dividend.*—The third method of issuing stock is by a stock dividend. It is allowable when an amount of cash or property equal to the amount of the par value of the stock so divided is added permanently to the capital stock of the corporation. A stock dividend can be made only when the whole of the capital stock has not been issued, or when it may be increased. It can never increase the capital stock beyond the amount as limited by legislative enactment. An issue of stock by a stock dividend is prohibited by constitutional or legislative enactment in some states. In England it has been a question of doubt whether stockholders can be

¹ See § 16, *supra*.

² See § 89, *infra*.

³ See § 89, *infra*. Although property which is deeded to a corporation in payment for stock is really subject to a mortgage which is not mentioned in the deed, the grantor is not liable on covenant of title where another piece of property was also

deeded as compensation for the amount of the mortgage. *Johnston v. Markle Paper Co.*, 153 Pa. St. 189 (1893).

⁴ See § 99, *infra*.

⁵ See § 766, *infra*.

⁶ See § 766, *infra*.

⁷ *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894).

compelled to accept a dividend of stock. These questions, however, are discussed elsewhere.¹

§ 26. *Pledge of stock by a corporation.*—It is now settled that a corporation may pledge its unissued stock to secure the debts of the corporation.² It is also clear that, for non-payment of the debt so secured, the pledgee may sell the stock;³ and such sale is legal even though the stock does not sell for its full par value.⁴

§ 27. *Issue of stock for partnership property or the property of another corporation.*—A copartnership may, of course, sell its stock to a corporation and take shares of stock in payment. But if the partnership is in a failing condition at the time of the transfer, the creditors of the firm may disregard the sale and levy an execution on the property itself.⁵ The same rules apply to a sale by one company to another.⁶

¹ See § 51, ch. XXXII, *infra*.

² See § 465, *infra*.

³ See § 476, *infra*.

⁴ See § 465, note.

⁵ This subject and the numerous

complicated questions connected with it are considered in ch. XL, *infra*.

⁶ *Id.*

CHAPTER III.

“WATERED” STOCK.—STOCK ISSUED ILLEGALLY FOR MONEY, PROPERTY, OR BY A STOCK DIVIDEND. IT IS THEN CALLED “WATERED” OR FICTITIOUSLY PAID-UP STOCK.

A. NATURE OF WATERED STOCK.

- § 28. Objects of issuing fictitiously paid-up stock.
 29. Methods of issuing “watered” stock — Forfeited stock.
 30. *Dicta* in regard to such issues.
 31. Fictitious stock may be voidable.

B. WATERED STOCK ISSUED FOR CASH.

32. First method of issue: By discount in cash.
 33, 34. Dangers attending this method.

C. WATERED STOCK ISSUED FOR PROPERTY OR CONSTRUCTION WORK WHICH IS OVERVALUED.

35. Second method: Issue of stock for property taken at an overvaluation.

D. WHO MAY COMPLAIN AND AGAINST WHOM COMPLAINT MAY BE MADE.

36. Liability on “watered” stock, and who may enforce it.
 37. Who may complain of an issue of stock as “paid up” when it has not been fully paid? — The state.
 38. Right of the corporation itself to complain.
 39. Stockholders participating in the act cannot complain.
 40. Transferees of participating stockholders cannot complain.
 41. Stockholders dissenting at the time of the issue may complain.

- § 42. Corporate creditors as complainants where the issue is for money.

43. Corporate creditors as complainants where the issue is for property or construction work.

44. Who is liable, and the character of the liability — Liability of the corporation.

45. Liability of persons to whom stock is issued for cash at less than par.

- 46, 47. Liability of persons to whom stock is issued for property taken by the corporation at an overvaluation — Liability of such persons under various constitutional provisions in Pennsylvania, Illinois, California, Nebraska, Alabama, Arkansas, Missouri, Texas, Louisiana, Colorado, and other states, and under statutory provisions in New York, Maine, Ohio, Wisconsin, Minnesota, Tennessee, Indiana, New Jersey, Washington and Iowa — Treasury stock.

48. Liability of the officers of the corporation.

49. Liability of the persons purchasing the stock with notice.

50. Liability of the *bona fide* transferees without notice.

E. ISSUE OF WATERED STOCK BY A STOCK DIVIDEND.

51. Third method: Issue by stock dividends.

A. NATURE OF WATERED STOCK.

§ 28. *Objects of issuing fictitiously paid-up stock.*—The issue of shares of stock as “paid up,” when in fact they are not paid

up, gives rise to some of the most complicated questions connected with the law of corporations.

A share of stock is supposed, in theory, to represent its par value in money or money's worth, paid in or to be paid in to the corporation. Accordingly, when it is issued as paid up, it is bought and sold in open market on the supposition that the corporation has received its full par value.¹ Upon this basis, transactions in paid-up stock, involving many millions of dollars, are of daily occurrence in the commercial centers of the country. The facilities which exist for the sale of properly issued stock are equally available for the sale of fictitiously paid-up stock, until it has become well understood and expected that railroad and business corporations will make these issues of stock. The issue is generally to the organizers or other co-operators, in ostensible payment for property or construction work. It is no unusual thing for a newly-organized railroad corporation to issue to a construction company bonds and stock whose par value is many times the value of the construction work done.² These bonds and the stock are then sold to the

¹ The reasons why the par value of stock is required by the law to be turned in to the corporation are stated by the supreme court of the United States in *Handley v. Stutz*, 139 U. S. 417, 428 (1891), as follows:

"The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. . . . If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be 'watered,' except the caprice of the stockholders."

² *Jeans, Railw. Prob.* 311 (1887), says: "In 1872 the difference between the total cost of American railways and their equipment, and the total capital of the system, was \$85,250,000. In 1884 this sum had been increased to upwards of \$162,000,000. In 1872 the watered capital amounted to an average of about \$1,800 per mile, but in 1884 the average of such capital was only \$1,343 per mile. At the end of 1884 fully ten per cent. of the total capital embarked in American lines was additional to the actual cost of the railways and their equipment, and the greater part of it may be regarded as representing 'watered' stock."

Atkinson, *Distribution of Products* (2d ed., 1886), page 259, says: "The elimination of what has been called 'watered stock and bonds,' against which the silly crusade of the so-called anti-monopolists has been directed, is therefore in process of accomplishment by methods far more

public at a profit, large or small, according to the prospects of the enterprise and the skill of the parties who are manipulating the corporation. Soon, however, default is made in the payment of the interest on the bonds, and this is followed by corporate insolvency, foreclosure, receivership and re-organization. The issue of fictitiously paid-up stock is the favorite device of corporate promoters, organizers and manipulators in carrying out their plans of realizing enormous gains from small investments, and in accumulating great fortunes at the expense of the public. Occasionally, too, the issue is made for the purpose of concealing large and unreasonable profits, which, if known, might cause the public to regulate and diminish the source of income. In such cases a stock dividend is generally resorted to.

§ 29. *Methods of issuing "watered" stock — Forfeited stock.* All stock which has been issued as paid-up stock, but whose full par value has not been paid into the corporation in money or money's worth, is watered to the extent that the par value exceeds the value actually paid in. There are three different ways in which watered stock is issued: It is done by issue of certificates of stock for an amount of *money* less than the par value of the stock, the certificates asserting on their face that the full value has been paid in; or for *property* or *construction work* taken at an overvaluation;¹ or by a *stock dividend*, the

potent than any possible legislative acts, namely, by the triple competition of water-ways. Second. The competition of one railway with another. Third. The competition of product with product in the greater markets of the world."

¹Mr. Simon Sterne, in the *Cyclopedia of Political Science, Political Economy and United States History*, vol. III, p. 527, describes this method of issuing "watered" stocks and bonds as follows:

"A line from one point to another, say a distance of one hundred miles, is surveyed. It is ascertained that it will cost about \$15,000 a mile to build, including acquisition of land, and about \$5,000 a mile to equip; a total of \$20,000 a mile. Application is then made for town and county

aid, which aid is generally represented by investment in the stock of the road. The first purpose is to give as little as possible in the way of value in return for such money aid, and it is therefore necessary to interpose between the stock and the property a sufficient number of mortgages to make prospective value of the stock of little or no value. A construction company is then organized, which takes the town and county aid as part of its capital; and the railway corporation, instead of making its contract on the basis of cash, issues to the construction company, say first-mortgage bonds of \$20,000 a mile, or possibly \$25,000 a mile; second-mortgage bonds of \$20,000 a mile, and stock of an equal value — making a total capitalization

equivalent par value of which has not been permanently added to the capital stock. Each of these three methods, as was shown in the preceding chapter, may be the means of issuing stock which had been paid up in good faith. Each, also, is available for the issue of “watered” stock. The second method particularly—that of taking property at an overvaluation—is well calculated to conceal the fictitious character of the issue, and to accomplish the purposes of the participants.

Where, however, a corporation has acquired shares of its own capital stock, either by purchase or by forfeiture for non-payment of calls, it may re-issue and sell the same at market prices.¹

§ 30. *Dicta in regard to such issues.*—There are various opinions, generally *dicta*, contained in the cases, as to the character of stock issued as paid up, when in fact it has not been paid for. The customary expression is that such an issue is a fraud upon the law and upon the public and upon the stockholders; or that it is against public policy; or is a fraud on subsequent purchasers of the stock so issued.² The law now is, however,

of \$65,000 a mile, instead of \$20,000 at which the road could be constructed. The construction company is composed generally, directly or indirectly, of the officers of the road and their friends, who build the road upon the basis of cash obtained by negotiating through bankers the securities represented by the bond issues of the railroad company; they acquire the stock for little or nothing, and also frequently a large proportion, if not the whole, of the second mortgage; and in prosperous times they may succeed in building and equipping the road on the issue of the bonds secured by the first mortgage alone. By this system the road comes into existence laboring under the necessity to earn, over and above operating expenses, interest on a funded debt about double the cost of the enterprise, and, if possible, to earn dividends on the stock beyond that sum.”

¹ Ramwell's Case, 50 L. J. (Ch.) 827

(1881), where the stock had been forfeited. See also to same effect, *dictum* in *Otter v. Brevoort, etc. Co.*, 50 Barb. 247 (1867); *People v. Albany, etc. R. R.*, 55 Barb. 344, 371 (1869); and § 314, *infra*.

But where a subscription is not paid, and the stock is transferred to the corporation as “treasury stock” and then sold below par, the purchaser is liable for the unpaid par value. *Alling v. Wenzel*, 133 Ill. 264 (1890).

It is not necessary that treasury stock be placed in the names of trustees for the benefit of the company. See §§ 309-314, *infra*.

² In *Barnes v. Brown*, 80 N. Y. 527, 534 (1880), the court said in a *dictum*: “It is not claimed, and could not be claimed, that the corporation or its directors could create any valid stock by issuing the same without any consideration. The directors assuming to issue stock in that way would perpetrate a wrong upon the corpora-

that an issue of stock as full paid-up stock, under an agreement that the full par value shall not be paid, is not necessarily a fraudulent transaction, but that as between the parties thereto it is a legal and valid agreement, and violates no principle of public policy.¹

tion and its stockholders, and a fraud upon every person who took such stock as full-paid stock, relying upon the appearances, and deceived thereby." In the case of *Sturges v. Stetson*, 1 Biss. 246, 253 (1858); S. C., 23 Fed. Cas. 311, 314, the court said: "The subscription of stock by plaintiff, for less than the price of the shares fixed by the charter, was void, as against law and the power of the directors." See also *Ex parte Daniell*, 1 De G. & J. 372 (1857); *Oliphant v. Woodburn, etc. Co.*, 63 Iowa, 332 (1884); *Tobey v. Robinson*, 99 Ill. 222, 228 (1881); *Osgood v. King*, 42 Iowa, 478 (1876). In *Coleman v. Howe*, 154 Ill. 458 (1895), the court said: "The issue of paid-up shares at less than their par value is a fraud upon the creditors."

¹ In *Scovill v. Thayer*, 105 U. S. 143, 153 (1881), the court say: "It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it [the stock]. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy." In *Re Ambrose, etc. Co.*, L. R. 14 Ch. D. 390, 394, 395 (1880), where paid-up stock was issued for property taken at a gross overvaluation, the court said: "It seems to me impossible to say that, however wrong the transaction was in respect to other persons, there was anything wrong as between the company and the vendors." In *Flinn v. Bagley*, 7 Fed. Rep. 785 (1881), the

court held that it was only as a fraud upon future creditors that exception could be taken to an issue of stock at a discount. In *Lorillard v. Clyde*, 86 N. Y. 384 (1881), the court held it legal for the parties, as between themselves, to issue paid-up stock for property taken at a valuation agreed upon between themselves. The court said: "If it had appeared that the organization of the corporation in this way was a device to defraud the public, by putting valueless stock on the market, having an apparent basis only, a different question would be presented." See also *Otter v. Brevoort, etc. Co.*, 50 Barb. 247, 256 (1867), *dictum*; *Spring Co. v. Knowlton*, 103 U. S. 49, 58 (1880), *dictum*.

There have also been various *dicta* in the cases and text-books that the issue of "watered" stock by mining companies is a customary, and hence legal, issue. There is no reason, however, why stock issued for a mine should be issued more recklessly than stock issued for a patent-right.

The case generally cited as holding that mining companies may legally issue watered stock is *Re South Mountain Consol. Min. Co.*, 7 Sawy. 30 (1881); S. C., 5 Fed. Rep. 403. In this case, however, it is stated that corporate creditors were protected "by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation." *Aff'd*, 14 Fed. Rep. 347 (1882).

Under the Minnesota statute authorizing mining corporations to sell their unissued stock as the corporation may see fit, and providing that if it is issued thus, as paid up, no further liability shall exist, the sale

The explanation of this is, as will be shown hereafter, that such issues are open to attack in some cases and in other cases they are not. It depends altogether on who complains of the issue and against whom complaint is made. The issue may be fraudulent as to one party while it is free from fraud as to another party.

The general statement of law that watered stock is illegal throws little light upon the important questions of the rights, risks and liabilities growing out of such issues of stock. The stockholder and the practitioner wish to know whether such stock is void or is voidable, or is valid. They wish to know, also, what are the rights and remedies of the various parties involved. If the stock is valid, then the question arises whether any one is liable for that part of the par value which has not been paid, and also who may bring suit to enforce that liability.

It is well settled that watered stock is not illegal and void *per se*, unless it is declared to be void by constitutional or statutory provisions. Nearly all the cases assume this to be the rule, and do not discuss it. Even when a constitution or statute declares such stock to be void, it is rarely possible to apply the statutory law. A few cases speak of such stock as being void; but, inasmuch as the remedies given in those cases were remedies for the rescission of contracts for fraud, they do not establish the proposition that the issue was void absolutely.¹ Thus, a *bona fide* purchaser of stock issued without consideration in violation of the constitution and statutes of Louisiana may nevertheless have a *status* to enjoin illegal acts of the directors.²

of shares of a par value of \$2 for six cents exempts the purchaser from further liability to any one, including corporate creditors. *Ross v. Kelly*, 36 Minn. 38 (1887). See, in general, *Kimberly v. Arms*, 129 U. S. 512, 530 (1889). A distribution of increased capital stock for no consideration whatsoever seems to have been sustained in *Knapp v. Publishers*, 127 Mo. 53 (1895), there being no creditors and all the stockholders assenting.

¹*Sturges v. Stetson*, 1 Biss. 246 (1858); S. C., 23 Fed. Cas. 311; *Fosdick v. Sturges*, 1 Biss. 255 (1858); S. C., 9 Fed. Cas. 501; *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875); *Campbell v. Morgan*, 4 Bradw. (Ill.) 100 (1879). The stock is voidable rather than void even in Alabama under a constitutional prohibition. *Nicrosi v. Irvine*, 102 Ala. 648 (1893). See also § 47.

²*United Elect. Sec. Co. v. Louisiana Elect. L. Co.*, 68 Fed. Rep. 673 (1895).

§ 31. *Fictitious stock may be voidable.*—Is stock voidable when fraudulently issued as paid up? There are few cases on this question, but the tendency of the courts is to hold that such issues of stock may be avoided by a withdrawal of the issue and a cancellation of the certificates. Thus, a court of equity, on the application of a dissenting stockholder, has decreed that stock falsely issued as paid-up stock should be delivered up to the corporation for cancellation.¹ Where, however, the stock has passed into the hands of *bona fide* purchasers for value, such purchasers are entitled to retain the stock. Some cases intimate that the stock fictitiously issued may be canceled, except a part whose par value would equal the amount actually paid in by the persons receiving it.² Many cases hold also that the transaction is in the nature of a fraudulent contract, and that it may be rescinded for fraud; in which case the stock would have to be returned to the corporation.

So far as the right of the corporation to issue stock below par is concerned, the courts have frequently held that the issue is an *ultra vires* act.³ But an *ultra vires* act is not always void absolutely, and it is voidable only at the instance of persons standing in a certain relation towards the act. Who can avoid the act will be explained hereafter.

¹ Gilman, etc. R. R. v. Kelly, 77 Ill. 426 (1875). In this case it was admitted that the stock was issued gratuitously and for the purpose of enabling the construction company to own a majority of the stock, thereby controlling the corporation.

² Sturges v. Stetson, 1 Biss. 246, 254 (1858); S. C., 23 Fed. Cas. 311, 315. The court said, in a *dictum*, that stock taken at less than par, with knowledge, is subject to the right of other stockholders, being such at the time of its issue, "to have it reduced to the charter value of the shares. This would take from him nearly one-third of his shares." In Fosdick v. Sturges, 1 Biss. 255 (1858); S. C., 9 Fed. Cas. 501, the court say there can be no question that this remedy is available.

³ Fisk v. Chicago, etc. R. R., 53 Barb.

513 (1868), where the court says: "It is not a question of good faith, or of honest intention, or of wise policy, or skilful or discreet management on the part of the directors. It is a question of power." In West Cornwall R'y v. Mowatt, 12 Jur., pt. 1, 407 (1848), the court sustained a demurrer to a bill for specific performance of a contract to take shares from the corporation at a discount, the court holding that the contract was *ultra vires*. In *Ex parte Daniell*, 1 De G. & J. 372 (1857), the court says: "It was very properly admitted . . . that the directors of the company had no power to pass the resolution" issuing the stock for less than its par value. In Bunn's Case, 2 De G., F. & J. 275, 295 (1860), it is held to be "beyond the functions and in excess of the powers" of the directors.

B. WATERED STOCK ISSUED FOR CASH.

§ 32. *First method of issue: By discount in cash.*—As already stated, paid-up stock may be improperly issued in three different methods: by part cash payment; by taking property at an overvaluation; by an invalid stock dividend.

An issue of paid-up stock for cash, upon payment of only part of the par value of the stock, is not often made, inasmuch as the real nature of the transaction is readily discovered and easily remedied. Sometimes the corporation makes the issue under a contract with those receiving it that no more than a certain percentage of the par value will be called for. Again, a release is sometimes made by a resolution of the directors or stockholders, after subscriptions have been made and partly paid, discharging the subscribers from any further liability on such subscriptions. The proceedings are generally spread upon the corporate records; certificates are issued, asserting on their face that they are paid up; and all inquiries at the corporate office are answered by a substantiation of that assertion.

§§ 33, 34. *Dangers attending this method.*—There are various dangers and liabilities growing out of such a transaction. The stock is liable to be canceled.¹ The person to whom it was issued,² or his transferee with notice,³ or the corporate officers participating in the act,⁴ may, under certain circumstances, each be held liable personally for the unpaid par value of the stock. They may be liable to the corporation itself,⁵ or to the corporate creditors,⁶ or to *bona fide* transferees of the stock.⁷

A *bona fide* transferee of such stock, however, is not liable.⁸

C. WATERED STOCK ISSUED FOR PROPERTY OR CONSTRUCTION WORK WHICH IS OVERVALUED.

§ 35. *Second method: Issue of stock for property taken at an overvaluation.*—A second method of issuing stock as paid up, when it is not actually paid up, is by its issue for property taken at an overvaluation. This method is the most frequently employed, the most difficult to prove, and the least easy to

¹ See § 31, *supra*.

² See §§ 46, 47, 167, *infra*.

³ See § 49, *infra*.

⁴ See § 48, *infra*.

⁵ See § 38, *infra*.

⁶ See §§ 42, 43, *infra*.

⁷ See § 40, *infra*.

⁸ See § 50, *infra*.

remedy. A large amount of litigation and confusion has been experienced and gone through with in determining the principles of law which should govern such transactions. The questions which have perplexed the courts were, first, what constitutes an overvaluation sufficient to invalidate the contract; second, what remedy should be applied when the contract was invalid.

It is now well settled that in order to invalidate an issue of stock which is issued for property taken at an overvaluation, it must be shown not only that there was an overvaluation, but also that such overvaluation was intentional and consequently fraudulent.¹ Moreover, it does not follow that because the issue was invalid the holders of the stock are liable thereon.² The better rule is that in such a case rescission is the only remedy, the property being returned to the stockholder and the stock returned to the corporation.³

The property is not to be considered as overvalued merely because, subsequently, it turns out to be so. The various circumstances under which the valuation was made should be considered in determining the *bona fides* of the transaction.⁴

¹Quoted and approved in *Kelley v. Fletcher*, 94 Tenn. 1 (1894). Under the Tennessee statutes that only cash or land "at a fair valuation" shall be received in payment for stock, the fact that the land was overvalued is insufficient. There must be proof of an "overvaluation which was intentionally fraudulent, or which was so gross as to be constructively fraudulent, as against corporate creditors." *Jones v. Whitworth*, 94 Tenn. 602 (1895); *Brant v. Ehlen*, 59 Md. 1, 29 (1882). In this case the court said: "So long as the transaction stands unimpeached for fraud, courts will treat as a payment that which the parties themselves have agreed shall be a payment, and this, too, in cases where the rights of creditors are involved." *New Haven, etc. Co. v. Linden Spring Co.*, 142 Mass. 349 (1886).

Where the plaintiff does not allege fraud in the valuation the action fails. An action framed on the theory

of unpaid subscriptions is ineffectual as a remedy. *Coffin v. Ransdell*, 110 Ind. 417 (1887).

In *Phelan v. Hazard*, 5 Dill. 45 (1878); S. C., 19 Fed. Cas. 429, Judge Dillon thoroughly reviews the authorities and says: "The contract is valid and binding upon the corporation and the original sharetakers unless it is rescinded or set aside for fraud; and . . . while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as a payment which the parties have agreed should be payment." See also *Brant v. Ehlen*, 59 Md. 1 (1882), fully explaining the meaning of the term "trust fund" as applied herein. *Crawford v. Rohrer*, 59 Md. 599 (1882).

²See § 46, *infra*.

³See § 46, *infra*.

⁴*Schenck v. Andrews*, 57 N. Y. 133 (1874). In *Coit v. North Carolina Gold Amal. Co.*, 14 Fed. Rep. 12 (1882),

D. WHO MAY COMPLAIN AND AGAINST WHOM COMPLAINT MAY BE MADE.

§ 36. *Liability on “watered” stock, and who may enforce it.* When it has been established that the overvaluation of the property taken in payment for stock was intentional and fraudulent, the questions then arise, what liability has been incurred, who is liable, and what is the remedy? The clearest method of investigating and presenting the law in answer to these questions is by considering, first, who may complain of the transactions — who may be the party plaintiff or complainant; second, who is liable in such a transaction — who is to be made the defendant. Incidentally also there arise questions as to the extent of that liability, and the remedy to be applied.

§ 37. *Who may complain of an issue of stock as “paid up,” when it has not been fully paid?—The state.*—As already indicated, the issue of stock as paid up, when not actually paid up, is an act *ultra vires* of the corporation. The commission of *ultra vires* acts by a corporation, to the detriment of the public, renders its charter liable to forfeiture, at the instance of the state.

The issue of fictitiously paid-up stock, with a view to defrauding the public, might constitute a misuse of the corporate rights

the court said corporators “ought not to be made liable individually for the debts of the company at the instance of creditors, because, at a later day, the estimates fairly put upon the property at that time have become modified by subsequent events, and will not amount to the value which they set upon it.”

On appeal the court, in affirming the judgment below (see *Coit v. Gold Amal. Co.*, 119 U. S. 343—1886), said: “Where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account.” To same effect, *Mege’s Case*, 10 W. N. (Eng.) 208 (1875).

In *Carr v. Le Fevre*, 27 Pa. St. 413 (1856), the court said that if the directors “took lands at a prospective

value, never realized, it is nothing more than many individuals and corporations have done before. Such an error in management or in their judgment of the value of a purchase, made without fraud, forms no ground for rescinding the contract.” See also *Schroder’s Case*, L. R. 11 Eq. Cas. 131 (1870).

Where a mine is turned in at a large valuation for stock, no fraud is proved by the mere fact that the mine subsequently turns out to have been worth only one-fifth of that amount. Fraud exists only in case of intentional overvaluation, “or such reckless conduct in the placing of this value, without regard to its real worth, as would indicate, without explanation, an intent to defraud.” *Young v. Erie Iron Co.*, 65 Mich. 111 (1887).

and privileges. In such a case it has been held that the state might forfeit the charter of the corporation, and that a very palpable case of fraud would justify forfeiture of the charter.¹

Moreover, when a corporation is guilty of an *ultra vires* act, and such act is detrimental to the interests of the public, it is possible that the attorney-general may file an information for the purpose of stopping such act.² Such a proceeding, however, would be difficult to maintain. An injunction does not lie at

¹ In *State v. Janesville Water Co.*, 92 Wis. 496 (1896), the court refused leave to the attorney-general to bring suit to forfeit the charter of a water-works company although it was alleged that watered stock and bonds had been issued, it being shown in opposition that there had been eight years' delay.

Quo warranto does not lie against a corporation merely because it issues its stock below par. *State v. Minnesota, etc. Co.*, 40 Minn. 213 (1889).

Under the statutes of Alabama in reference to watered stock, *quo warranto* lies where one million dollars of stock is issued for the possibility of patents to be thereafter granted. In such *quo warranto* proceedings stockholders need not be made parties. *State v. Webb*, 97 Ala. 111 (1893).

The Pennsylvania statute against railway companies issuing stock except for cash at par applies to street railroads, and the attorney-general by the statute is obliged to enforce the statute whenever any stockholder or two reputable citizens make out a *prima facie* case. *Cheetham v. McCormick*, 178 Pa. St. 186 (1896).

In *Holman v. State*, etc., 105 Ind. 569 (1886), the state caused a charter to be forfeited because the subscribers for stock were insolvent at the time of subscribing, thereby perpetrating a fraud on the public. See also *State v. Atchison, etc. R. R.*, 24 Neb. 143 (1888). The case *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242 (1878), was overruled by *National Docks R'y v. Central R. R.*, 32 N. J.

Eq. 755 (1880), according to *Elizabethtown G. L. Co. v. Green*, 46 N. J. Eq. 118 (1890): affirmed, 49 N. J. Eq. 329 (1892). See also 97 Ala. 111.

The state may bring an action to forfeit a charter where the corporation commences business before the full capital stock is subscribed. *People v. National Sav. Bank*, 11 N. E. Rep. 170 (Ill., 1887); affirmed on rehearing, 129 Ill. 618 (1889).

The state cannot enjoin private parties from dealing in "watered" stock. *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888); *People v. National Sav. Bank*, 11 N. E. Rep. 170 (Ill., 1887); affirmed on rehearing, 129 Ill. 618 (1889). See also *Columbus, etc. R. R. v. Burke*, 20 Week. L. Bull. 287 (Ohio, 1888); ch. XLVI, § 766, where the prolonged litigation in New York and Ohio over that transaction is explained.

Quo warranto failed in *Commonwealth v. Central P. R'y*, 52 Pa. St. 506 (1866), where a large amount of "watered" stock was issued.

² See § 635, *infra*.

The state will not be allowed to intervene in a foreclosure suit for the purpose of preventing it on the ground that the bonds are illegal and void, and that on a re-organization a greater issue will be made. *State v. Farmers' L. & T. Co.*, 81 Tex. 530 (1891).

Concerning the power of the state to object to an *ultra vires* act of a private corporation by any proceeding other than *quo warranto*, see *People v. Ballard*, 134 N. Y. 269 (1892).

the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein.¹

§ 38. *Right of the corporation itself to complain.*—The corporation itself, after issuing its stock as paid-up stock, and declaring it so to be, cannot subsequently repudiate that declaration and agreement and proceed to collect, either from the person receiving the stock or his transferee, the unpaid part of the par value. It is estopped from so doing.²

¹Stockton v. American, etc. Co., 36 Atl. Rep. 971 (N. J., 1897). A state cannot file and sustain a bill to declare void watered stock and bonds, and enjoin a foreclosure sale, and to have the property sold, and the proceeds applied to the moneys actually expended by the corporation. “The state has no authority to protect such private rights by suit.” State v. Guaranty, etc. Co., 73 Fed. Rep. 914 (1896). A statute authorizing a corporation to reduce its capital stock waives informalities in its incorporation, and such waiver may extend to an illegal issue of watered stock. State v. Webb, 110 Ala. 214 (1896).

²First Nat. Bank v. Gustin, etc. Co., 42 Minn. 327 (1890).

Where a bridge corporation issues all its stock and bonds to a construction company, the stock having been first subscribed for by the promoters, a contract between the construction company and the promoters by which the latter take the profits and such of the stock as is not used is legal, so far as the bridge company is concerned. The court will enforce the contract for the division of the stock. Even a settlement made without knowledge and a year’s delay are not fatal. Krohn v. Williamson, 62 Fed. Rep. 869 (1894); affirmed *sub nom.* Williamson v. Krohn, 66 Fed. Rep. 655 (1895).

Where stock is issued for property neither the corporation nor a discon-

tented stockholder can hold the party receiving the stock liable for any further payments, even though the property was overvalued. A corporate creditor might possibly stand in a different position. The court said: “Whatever may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then holding stock, nor any person who afterwards became a stockholder by assignment from one who then held stock, can now make complaint, on behalf of the corporation, as against the fairness of that transaction. This I take to be the settled law on that subject.” Northern Trust Co. v. Columbia, etc. Co., 75 Fed. Rep. 936 (1896).

The corporation cannot complain that the stock was issued for property taken at an overvaluation. Wells v. Green Bay, etc. Co., 90 Wis. 442 (1895).

Land which cost \$100,000 and upon which only \$33,333 had been paid, the remainder being secured by a purchase-money mortgage, was sold to a corporation organized for that purpose for \$500,000 of stock; in other words, the \$33,333 equity of redemption of the land was turned in for \$500,000 of stock. The holders of the stock then donated \$200,000 thereof

Where, however, actual fraud enters into the transaction, then the corporation is not estopped from having the agreement set aside. The person receiving the stock can then be compelled to return the stock or its market value, and take back that which

to the treasury to be sold to pay off the mortgage for \$66,666. The company borrowed money to make a partial payment on the mortgage and then brought suit against a stockholder on the theory that the stock was not paid up. The court held that the suit would not lie. *John, etc. Land Co. v. Cooke*, 44 S. W. Rep. 391 (Ky., 1898).

Even though a corporation accepts a note instead of cash in payment for a subscription, in violation of the statute which provides that only money, labor done or property actually received shall be accepted in payment for stocks and bonds, yet a bank which discounted such note for a corporation may hold the corporation liable thereon. *First Nat. Bank v. Cornell*, 8 N. Y. App. Div. 427 (1896).

In the case of *Scovill v. Thayer*, 105 U. S. 143 (1881), the court said, in a *dictum*: "No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors. . . . The shares were issued as full paid, on a fair understanding, and that bound the company." The issue had been at a discount. See also *Union, etc. Co. v. Frear, etc. Co.*, 97 Ill. 537 (1881), *dictum*. In the case of *Granite Roofing Co. v. Michael*, 54 Md. 65 (1880), stock was issued as paid up for cash, although not actually paid. The corporation passed under the control of purchasers of the stock, who caused the corporation to sue the original subscribers for the unpaid par value of the stock. The court said: "While the law may reject, as illegal and fraudulent, that which the parties have agreed upon, . . . it will not arbitrarily incorporate, in lieu thereof, terms

in the contract to which the parties have never assented." In the case of *Re Ambrose Lake, etc. Co.*, L. R. 14 Ch. D. 390 (1880), where all the stockholders acquiesced and there were no creditors' rights involved, the court held that the corporation could not hold the directors liable for the profits made by them. In *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334 (1875), the corporation had released the subscriber after the subscription had been made. The release being without consideration, and not a contract, was held void, and the corporation was allowed to recover. See also *San Antonio St. R'y v. Adams*, 87 Tex. 125 (1894), rev'g 25 S. W. Rep. 639. An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. *York Park Bldg. Assoc. v. Barnes*, 39 Neb. 834 (1894). The case of *Society of Prac. Knowl. v. Abbott*, 2 Beav. 559 (1840), was distinguished in *Re British, etc. Box Co.*, L. R. 17 Ch. D. 467 (1881), the latter case holding that no one is liable on fictitiously paid up stock where all acquiesced and there was no intent to bring in new stockholders. This is held to be the rule even though new stockholders were subsequently brought in.

In the case of *Harrison v. Union Pac. R'y*, 13 Fed. Rep. 522 (1882), where plaintiff sued to recover on bonds guaranteed by the defendant, the court said: "The intention of the Arkansas Valley Railway Company was to sell the stock to Harrison for less than its par value; *i. e.*, to give him \$15,000 in stock, twenty bonds of the company, guaranteed by the Kansas Pacific Company, and the Clay county bonds, all for \$15,000 in cash. There

he gave to the corporation for it. But the corporation cannot hold him liable for the par value of the stock.¹

The corporation has also a remedy herein against its directors who issued the stock either fraudulently or in an *ultra vires*

is nothing in the statutes of Colorado, where the corporation was created, to forbid the sale of stock at less than par; nor was Harrison forbidden to purchase the stock by reason of the fact that he was already a stockholder and director in the Kansas Pacific Railway Company. The transaction was therefore valid as between the corporation and Harrison, whatever the right of the creditors of the corporation as against Harrison may be." See also *Harrison v. Arkansas Valley R. R.*, 8 South. L. R. 182 (U. S. C. C., 1882).

In *St. Louis, etc. R. R. v. Tiernan*, 37 Kan. 606 (1887), it was held that an issue of \$3,600,000 of stock and the payment of \$200,000 to directors for an old road-bed which cost them \$15,000, was legal, since all the stockholders and directors, except a few nominal holders of stock, were fully informed of the facts, and no other stockholders came in until several months subsequently. The corporation was held incompetent to complain. See also *Flinn v. Bagley*, 7 Fed. Rep. 785 (1881); *Re Glen Iron Works*, 17 Fed. Rep. 324 (1883). Cf. *People v. Sterling Mfg. Co.*, 82 Ill. 457 (1876). As to receivers, see *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

A corporation cannot hold the directors liable on stock which the corporation issued to them for services, at five cents on the dollar, in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock; that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely specula-

tive, and had no market value. *Divine v. Universal, etc. Co.*, 38 N. W. Rep. 93 (Tenn., 1896).

Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. *Arkansas, etc. Co. v. Farmers' L. & T. Co.*, 13 Colo. 587 (1889).

Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. *Millsaps v. Merchants', etc. Bank*, 71 Miss. 361 (1893).

¹ See § 47. It is to be noticed, however, that there are few well-defined cases on this principle of law. Most of the cases on the liability of the director herein involved the additional fact that the director received some of the stock himself. In the case of *Continental Tel. Co. v. Nelson*, 49 N. Y. Super. Ct. 197 (1883), the president was sued by the corporation itself for issuing stock in payment of labor, the par value of the stock being worth over twice the value of the labor. The court held that he was liable only for the actual market value of the stock in excess of the value of the labor, and submitted the question to the jury.

A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. *American, etc. Co. v. Bayless*, 91 Ky. 94 (1891). But

manner.¹ This liability is similar to their general liability to the corporation for fraudulent, negligent or *ultra vires* acts on their part.² The measure of their liability herein is not the par value of the stock, less the value actually received therefor by the corporation, but it is the actual or market value of the stock, less the property or cash actually received by the corporation on the stock so issued. It has also been held that the corporation cannot, in a court of equity, compel a person, who agreed to take stock at a discount, to carry out the contract, inasmuch as it is *ultra vires*.³

Where the corporation contracts to issue stock to a contractor for work to be done in the future, and such work is not completed, various complications arise. This subject, however, is considered elsewhere.⁴

§ 39. *Stockholders participating in the act cannot complain.*—Stockholders in a corporation, who participate or aid in the issue of paid-up stock, upon payment of less than its par value, or who have knowledge of the act and acquiesce therein, cannot afterwards complain of the transaction, either in their own behalf as stockholders or creditors or in behalf of the corporation. They are bound by estoppel or acquiescence.⁵

see *People v. Sterling, etc. Co.*, 82 Ill. 457 (1876), holding that the corporation may refuse to allow a transfer of watered stock.

Although the incorporators of a New Jersey company have contracted to issue sixty per cent. of its stock to a person for two patents, yet the board of directors after the company is organized may refuse to carry out the agreement, one patent being worthless and the other not having been perfected. The court said: "To justify a corporation in issuing stock under our act for property purchased, there should be an approximation, at least, in true value of the thing purchased to the amount of the stock which it is supposed it represents." *Edgerton v. Electric, etc. Co.*, 50 N. J. Eq 354, 361 (1892).

¹ See § 48.

² See Part IV.

³ *West, etc. R'y v. Mowatt*, 12 Jur., pt. I, 407 (1848).

⁴ See § 766, *infra*.

⁵ Although \$1,500,000 of stock, issued as fully paid, and \$1,500,000 in bonds are issued for the construction of a work which costs less than \$1,500,000, yet an attorney who took part in the transaction cannot, as a creditor of the corporation, claim that the stock was not fully paid. *Ten Eyck v. Pontiac, etc. R. R.*, 72 N. W. Rep. 362 (Mich., 1897).

A promoter who takes part in selling property to the corporation for stock, the par value of which is five times the amount paid by the promoters for the property, and who afterwards becomes a director and then sells his stock and becomes a creditor of the corporation, cannot hold the stockholders liable for the difference between its par value and

The cases are in conflict on the question whether the party receiving stock at a partial discount of its par value may repudiate the transaction and recover from the corporation the

the value of the property. *Nicrosi v. Calera L. Co.*, 22 S. Rep. 147 (Ala., 1897).

Where \$59,000 of stock and \$20,000 of bonds are issued for a gas plant worth \$34,000 besides the franchise, a judgment creditor cannot hold the stockholders liable on the stock where he himself is a stockholder and no charge of fraud is made. *Woolfolk v. January*, 131 Mo. 620 (1895).

Stock may be issued for the goodwill of a business, and a person who has taken part in the transaction cannot afterwards complain. *Washburn v. National, etc. Co.*, 81 Fed. Rep. 17 (1897).

In *Re Gold Co.*, L. R. 11 Ch. D. 701, 712 (1879), the court says: "It could not be a fraud upon, or a wrong to, the existing shareholders, because every one of them was a party to the transaction." See also *Scovill v. Thayer*, 105 U. S. 143 (1881); *Lorillard v. Clyde*, 86 N. Y. 384 (1881); *Hall v. Brooklyn El. R. R.*, N. Y. L. J., April 30, 1892; *Kolsky v. Euslen*, 103 Ala. 97 (1894). But in the case of *Knowlton v. Congress, etc. Co.*, 14 Blatchf. 364, 368 (1877); S. C., 14 Fed. Cas. 797, the court said in a *dictum*: "Can there be any doubt that, up to the time of the abandonment of the scheme by the defendant, the plaintiff could have resorted to a court of equity and restrained further proceedings and vacated the proceedings already taken? The cases are numerous where courts of equity have interfered to prevent the consummation of a wrong, upon the motion of a party who was instrumental in its inception." Affirmed, *Spring Co. v. Knowlton*, 103 U. S. 49 (1880). The issue of stock in that case was held to be absolutely void by statute.

A participating stockholder cannot complain, even though he or his assignee is a corporate creditor. *Callanan v. Windsor*, 78 Iowa, 193 (1889); *Lewis v. N. Y. etc. Iron Co.*, N. Y. L. J., April 30, 1890.

A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state (Pennsylvania). *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890).

A purchaser of stock who voted in favor of a re-organization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. *Hollins v. St. Paul, etc. R. R.*, 9 N. Y. Supp. 909 (1899).

In the case of *Skinner v. Smith*, 134 N. Y. 240 (1892), \$40,000 of stock was issued for letters patent. Afterwards, with the consent of all the stockholders, the transaction was rescinded, the stock being returned and the patents re-transferred. A license to manufacture under the patents was then transferred to the company for \$350,000 in stock. The court found that the transaction was in good faith and with no intent to defraud future stockholders, and that the license was an adequate consideration for the stock. The court held that there was nothing illegal in the transaction.

A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party has made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the

money he has already paid thereon.¹ It is certain, however, that where the stockholders participating in the issue use the stock to rob a railroad and bribe a judge, and then disagree

stock. *Robinson v. Dolores, etc. Co.*, 2 Colo. App. 17 (1892).

A person to whom watered stock has been issued as full-paid stock is not such a *bona fide* stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. *Hinckley v. Pfister*, 83 Wis. 64 (1892).

A conditional sale of stock, the condition being that the sale shall be complete for fifty cents on the dollar, when the stock is worth par, is valid. Until the stock is worth par no further sum is recoverable by a creditor who as a stockholder participated. *Callanan v. Windsor*, 78 Iowa, 193 (1889).

A person who buys stock in a company, knowing that the stock was issued without consideration, cannot compel another stockholder to return his stock to the company for cancellation or to account for dividends. *Clark v. American Coal Co.*, 86 Iowa, 436 (1892).

A stockholder who, as secretary, signed certificates of stock cannot claim they were watered stock and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. *Wisner v. Delhi, etc. Co.*, 46 La. Ann. 1223 (1894).

Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrange-

ment, can complain of it. *Schilling, etc. Co. v. Schneider*, 110 Mo. 83 (1892).

Where about one-half of the capital stock is issued as full-paid stock for property, the real value of which is one-quarter of the par value of the stock, and then subsequently the remaining stock is sold for cash at one-quarter of its par value, as between the stockholders and the corporation, the remaining seventy-five cents on the dollar cannot be collected from the parties to whom the stock was issued for cash, it having been agreed at the time of the issue that the stock should be full-paid and non-assessable. *Green v. Abietine, etc. Co.*, 96 Cal. 322 (1892).

¹ The case of *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655 (1884), holds that a participating subscriber cannot withdraw and recover back sums already paid. See also *Goff v. Hawkeye, etc. Co.*, 62 Iowa, 691 (1883). *Knowlton v. Congress, etc. Spring Co.*, 57 N. Y. 518, 537 (1874), holds the same, the court saying: "Such parties are left in the position they have placed themselves." The latter case was decided otherwise in the federal courts (*Knowlton v. Congress, etc. Spring Co.*, 14 Blatchf. 364 (1877); S. C., 14 Fed. Cas. 797, and *Spring Co. v. Knowlton*, 103 U. S. 49, 1880), it being there held that a recovery might be had where others are repaid. A person to whom stock is issued for cash at a discount may sue to have his subscription canceled. *Re Zoedone Co.*, 60 L. T. Rep. 383 (1889).

Mandamus will not issue to compel the issue of stock at a discount, in performance of a resolution by the stockholders that such issue shall be made. Equity will not aid the fraud.

among themselves, the courts will not aid one as against the others.¹

§ 40. *Transferees of participating stockholders cannot complain.*—Not only the participating and acquiescing stockholders, but also their transferees, are bound by the participation or acquiescence. The transferee cannot claim to have greater rights than his transferrer, as regards a general remedy invalidating the whole transaction. He cannot bring suit in behalf of the corporation and other stockholders against the party or parties participating in the issue, inasmuch as his own title is tainted with the same fraud.² Nor can he bring an action

State v. Timken, 48 N. J. L. 87 (1886).

¹ Tobey v. Robinson, 99 Ill. 222 (1881). Although a stockholder has transferred certain stock to the president to be used to bribe governmental officials in obtaining a renewal of governmental contracts with the corporation, yet the stockholder may recover back the stock, it not having been used for that purpose. Mulvane v. O'Brien, 49 Pac. Rep. 607 (Kan., 1897). The courts will not aid a stockholder as against directors' breaches of trust, where the business is illegal and the stock fictitious and "watered." Le Warne v. Meyer, 38 Fed. Rep. 191 (1889). Where an option to buy mining lands is sold to a Missouri corporation for \$1,000,000 of stock, the promoters paying practically nothing, the act is illegal under the Kansas constitution, and a suit by one of them to obtain his share of the stock will fail. Garrett v. Kansas, etc. Min. Co., 118 Mo. 330 (1892). Where "watered" stock is issued to directors and then by common consent an assessment is levied on such stock, an agreement of one of them to cancel his stock is binding on him and his transferees who took with knowledge. Hill v. Atoka, etc. Min. Co., 124 Mo. 153 (1894).

² See §§ 730, 735, *infra*; Higgins v. Lansingh, 40 N. E. Rep. 362 (Ill., 1895);

Parsons v. Hayes, 14 Abb. N. Cas. 419 (N. Y. Super. Ct., 1883); Nott v. Clews, 14 Abb. N. Cas. (N. Y.) 437 (1883); Ffooks v. Southwestern R'y, 1 Sm. & G. 142 (1853); *Re* British, etc. Box Co., L. R. 17 Ch. D. 467 (1881), holding that new stock also is bound; Flagler, etc. Co. v. Flagler, 19 Fed. Rep. 468 (1884); *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883); Kent v. Quicksilver Min. Co., 78 N. Y. 159, 188 (1879); Callanan v. Windsor, 78 Iowa, 193 (1889); Venner v. Atchison, etc. R. R., 28 Fed. Rep. 581, 591 (1886). A *bona fide* purchaser of tainted stock stands in no better position than his transferrer. Drake v. New York, etc. Co., 26 N. Y. App. Div. 499 (1898); Miller v. University, etc. Co., N. Y. L. J., Nov. 13, 1894. Even though a party acquires all the stock of a corporation amounting to \$1,500,000, and then through dummy directors issues \$3,500,000 additional stock and \$4,000,000 of mortgage bonds to himself, and then proceeds to sell the stock and bonds to the public, yet a person who purchases some of the stock cannot file a bill in equity against the corporation to set aside the transaction and to ascertain what part of his stock is legal. His remedy is at law for damages, or he may repudiate and recover back his money. "It is elementary that the court is possessed of no power to make a new contract between par-

against the corporation.¹ But the transferee is by no means without a remedy. He may bring an action for damages against those who, knowing the facts, induced him to purchase, or those who made it possible for the fraud to be practiced, or who actually assisted in perpetrating the fraud upon him.²

ties entirely distinct and different from the contract that they have entered into." *Church v. Citizens' Street R. R.*, 78 Fed. Rep. 526 (1897). The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. *Barr v. New York*, etc. R. R., 125 N. Y. 263 (1891). See, also, *Langdon v. Fogg*, 18 Fed. Rep. 5 (1888). *Contra*, *Parsons v. Joseph*, 93 Ala. 403 (1891). In *Foster v. Seymour*, 23 Fed. Rep. 65 (1885), an issue of stock for property at an overvaluation is distinctly held to be no fraud upon the corporation, nor upon the stockholders, all of whom participated. "A purchaser of the stock would not be injured by the transaction unless he paid more for it than it was worth; and every purchaser would stand upon the particular circumstances of his purchase." A suit against the guilty parties, who were the directors, to compel them to account for a fraudulent disposition of corporate property, will not lie. The fraud is not corporate; it is personal. See also §§ 705-707. "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock." *United Elect. Sec. Co. v. Louisiana Elect. Light Co.*, 68 Fed. Rep. 673 (1895). But in *London Trust Co. v. Mackenzie*, 68 L. T. Rep. 380 (1893), the court said: "I think there is no authority for the general proposition that an ordinary transferee of shares in a limited company is affected by the fact that his transferrer had knowledge which would have disabled him from suing."

¹ In *Re Gold Co.*, L. R. 11 Ch. D. 701 (1879), the court said: "It was not a wrong done by the company or to the company." In *Re Ambrose Lake*, etc. Min. Co., L. R. 14 Ch. D. 390, 397 (1880), the court says: "There would be no liability on the part of the company as such."

² The leading case on this principle of law is *Cross v. Sackett*, 6 Abb. Pr. 247 (1858), argued by eminent counsel and decided by learned judges. A *bona fide* purchaser in open market, from an innocent holder of stock issued as paid up for property taken at an overvaluation, sued a director, being also an original stockholder, for damages. The court in its decision said: "When a party projects and publicly promulgates the scheme of a joint-stock company; when he causes the usual books to be opened, and allows or causes the inscription of a person as an owner of an interest to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right directly issued and of the same effect as if signed by himself; when he accompanies that certificate by a written power authorizing a transfer at large by the party to whom he has given the certificate; when that representation induces an innocent person to advance his money,—the defendant's own individual act has created the privity of contract, . . . and he must be held responsible to any one who has been deceived." See also note 1, p. 683.

The plaintiff must prove that a representation was made that the stock was paid up, and that he relied

The transferee has other remedies. If the transfer to him was from one of the participants, he may rescind the transfer and recover back the price paid by him;¹ or, if the contract of purchase is not yet completed, he may refuse to take the stock.²

§ 41. *Stockholders dissenting at the time of the issue may complain.*—Stockholders, being such when an issue of paid-up stock is improperly made, and not assenting to or acquiescing in it, may bring suit in a court of equity to annul and set aside the whole transaction.³ It has been held that the issue may be

thereon, and that the representation was false and fraudulent. *McAleer v. McMurray*, 58 Pa. St. 126 (1868); *Priest v. White*, 89 Mo. 609 (1886).

The court, in *In re Ambrose Lake, etc. Co.*, L. R. 14 Ch. D. 390, 397 (1880), said that the transferee has a remedy against the person who, in any way, made the misrepresentations to him. *Re Gold Co.*, L. R. 11 Ch. D. 701, 713, 714 (1879), is to the same effect. In *Barnes v. Brown*, 80 N. Y. 527 (1880), the plaintiff, being under contract to receive paid-up stock from defendants, received such, and afterwards discovered that its par value had not been paid in to the corporation. The court held that he could recover damages from the defendant for the fraud.

Where after incorporation and before a business is turned over the owner of the business gets money of an incorporator and delivers a certificate of full-paid stock in payment, although the stock has never been paid up, the former is not a debtor to the latter, although the business is never turned over to the company. *Re Frye*, 75 Hun, 402 (1894).

¹*Fosdick v. Sturges*, 1 Biss. 255 (1858); S. C., 9 Fed. Cas. 501. In this case the certificate was brought into court to be disposed of as the court should direct. See also § 350 *infra*.

²*Sturges v. Stetson*, 1 Biss. 246, 253 (1858); S. C., 23 Fed. Cas. 311, 314, the

court holding that an action for the price of such stock is in the nature of a bill in equity for the specific performance of a contract, and the defendant may defeat it by avoiding the contract altogether, although the certificates have been transferred to him. To same effect, *Coolidge v. Goddard*, 77 Me. 579 (1885).

³In *Fisk v. Chicago, etc. R. R.*, 53 Barb. 513 (1868), the court enjoined any transfer of the stock, and appointed a receiver to receive what the corporation had realized from the stock, and to use the funds in retiring the stock and paying damages caused thereby. In *Sturges v. Stetson*, 1 Biss. 246, 254 (1858); S. C., 23 Fed. Cas. 311, 314, and *Fosdick v. Sturges*, 1 Biss. 255, 259 (1858); S. C., 9 Fed. Cas. 501, 503, the court in *dictu* said that the issue could be withdrawn, leaving with the guilty parties so much stock as the money paid by them would equal the par value of. Where the statute authorizing consolidation specifies that the consolidated capital stock shall not be more than the "fair aggregate value" of the property, a stockholder may enjoin a consolidation whose capital stock is far in excess of a fair value of the property. *Langan v. Francklyn*, 20 N. Y. Supp. 404 (1892).

Stockholders may restrain the issue of deferred "bonds," i. e., irredeemable bonds entitling the holder to in-

canceled.¹ The dissenting stockholders' rights and remedies herein, in their scope and details, are similar to the rights and remedies of stockholders in other cases of *ultra vires* acts or fraud to the injury of the corporation — a subject fully treated in the fourth part of this work.² A suit to determine what stock is watered stock and also to set aside transactions by which the corporate property has been misapplied is multifarious.³ Laches is a bar to a dissenting stockholder's suit.⁴ A dissenting stockholder cannot obtain a dissolution of the

terest after a certain dividend is paid to the stockholders, it being merely a scheme to issue stock below par. *Taylor v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 386 (1881). Compare § 762, *infra*.

¹ *Campbell v. Morgan*, 4 Bradw. (Ill.) 100 (1879); *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875).

A dissenting stockholder may cause an issue of stock to be canceled where it was issued for land at five times its real value, and then the capital stock was doubled and the increase issued for nothing. *Parsons v. Joseph*, 92 Ala. 403 (1891).

A dissenting stockholder may cause to be canceled certain stock which was issued without consideration to a construction company in which the directors are interested. *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875).

Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Such an issue is also illegal by the statutory law of the state. *Perry v. Tuskaloosa, etc. Co.*, 93 Ala. 364 (1891).

The issue of new stock by the corporation cannot be enjoined where

neither the corporation nor any of its directors are parties to the action. *White v. Wood*, 129 N. Y. 527 (1892).

² They cannot have the corporation wound up therefor. *Re Gold Co.*, L. R. 11 Ch. D. 701 (1879); *Morrison v. Globe Panorama Co.*, 28 Fed. Rep. 817 (1886); *Re Mashonaland Pioneers*, L. R. 1 Ch. 731 (1893). See also ch. XL, *infra*.

³ *Church v. Citizens' Street R. R.*, 78 Fed. Rep. 526 (1897).

⁴ Where the directors sell unissued stock at a discount to a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. *Keeney v. Converse*, 99 Mich. 316 (1894).

Where a worthless equity of redemption in land is turned in for stock and then the stock is pledged with the mortgagee of the land, and then "scrip" is taken from the corporation by the parties pledging the stock, this scrip reciting that it represented the equity of the right to the certificates of stock when the mortgage was paid off, such scrip is valid and may be sold, even though it was issued without consideration, it having been treated as valid for twenty years. *Higgins v. Lansingh*, 154 Ill. 301 (1895).

Laches on the part of the dissenting stockholder will bar his remedy. *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882).

Thirty years' delay on the part of

company on the ground that stock has been issued at a discount for cash.¹

§ 42. *Corporate creditors as complainants where the issue is for money.*—According to well-established rules of law in America, corporate creditors may object to certain transactions, which, as between the corporation and its stockholders and third persons, may be valid and binding. This right of corporate creditors is an essentially American doctrine. It is based on the contract, express or implied, that a subscription for or taking of stock creates an obligation to pay for the same at par, except as to parties who have expressly or impliedly waived this obligation. Where stock is issued for property the above principle of law does not afford much protection to corporate creditors, inasmuch as the prevailing rule is that even though the property is overvalued and fraudulently overvalued, yet that rescission is the only rule, the stock being returned and canceled and the property returned to the vendor.² Where, however, the issue of stock was for cash, under an agreement that only part of the par value need be paid, corporate creditors may compel the persons receiving the stock to pay the unpaid full par value.³

a dissenting stockholder is fatal. *Foster v. Belcher's, etc. Co.*, 118 Mo. 238 (1893). See also ch. XLIV, *infra*.

¹ *Re Pioneers', etc. Syndicate*, 68 L. T. Rep. 163 (1893).

² See § 46, *infra*.

³ The leading case on this point is *Sagory v. Dubois*, 3 Sandf. Ch. 466, 499 (1846), where the court said: "The defendant being liable by force of his subscription for the stock, the resolution of the directors . . . not to make any further calls upon the shares was unavailing to discharge his obligation in respect of the association and its creditors." In *Scovill v. Thayer*, 105 U. S. 143 (1881), the court said that a contract whereby stockholders are to pay but part of the par value of their stock to the corporation, "though binding on the company, is a fraud in law on its creditors, which they can set aside;

when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full." *Upton v. Tribilcock*, 91 U. S. 45 (1875), is the first of a series of cases growing out of the failure of the Great Western Insurance Company of Illinois. The other cases are *Sanger v. Upton*, 91 U. S. 56 (1875); *Webster v. Upton*, 91 U. S. 65 (1875); *Chubb v. Upton*, 95 U. S. 665 (1877); *Pullman v. Upton*, 96 U. S. 328 (1877); *Hawley v. Upton*, 102 U. S. 314 (1880); *Upton v. Burnham*, 3 Biss. 431 (1873); S. C., 3 Biss. 520; S. C., 28 Fed. Cas. 831, and *Upton v. Hansbrough*, 3 Biss. 417 (1873); S. C., 28 Fed. Cas. 839; *Great Western Tel. Co. v. Gray*, 122 Ill. 630 (1887). This series of cases established for the federal courts the rule given above. A stockholder may file a bill in equity to review an assessment ob-

A resolution by a corporation that upon the stockholders paying in a portion of the par value of the stock the capital shall be deemed to be fully paid is wholly ineffectual as against the creditors of the company.¹ A representation of the corpo-

tained by a receiver of an insolvent corporation where the claim upon which the receivership is based and all the proceedings subsequent thereto are permeated with fraud. *Farwell v. Great West. Tel. Co.*, 161 Ill. 522 (1896), reviewing in full the twenty years litigation growing out of the insolvency of the Great Western Telegraph Company. *Flinn v. Bagley*, 7 Fed. Rep. 785 (1881), gives a full review of the American and English doctrine herein. See also *Re Glen Iron Works*, 17 Fed. Rep. 324 (1883); *Union, etc. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537 (1881); *Hickling v. Wilson*, 104 Ill. 54 (1882); *Northrop v. Bushnell*, 38 Conn. 498 (1871); *Eyerman v. Kriekhaus*, 7 Mo. App. 455 (1879); *Skrainka v. Allen*, 7 Mo. App. 434 (1879); *Pickering v. Templeton*, 2 Mo. App. 424 (1876); *Christensen v. Eno*, 21 Weekly Dig. 202 (1885); *Mann v. Cooke*, 20 Conn. 178 (1850); *Myers v. Seeley*, 10 Natl. Bank Reg. 411 (1874); S. C., 17 Fed. Cas. 1118. Although the statutes authorize the directors to dispose of the capital stock at any time remaining unpaid in such manner as the by-laws may prescribe, yet this does not authorize the issue of stock for cash at less than par. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

Where the directors of an insurance company issue to themselves all the stock at one-third of its par value, and upon an increase of the capital vote to themselves, for services in selling the increase, one share for every two shares sold, they are liable upon corporate insolvency for the unpaid par value of the first issue, and the par value of the stock re-

ceived as compensation. Their transferee with notice was held liable. *Freeman v. Stine*, 15 Phila. 37 (1881).

¹ "It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark v. Bever*, 139 U. S. 96 (1891); *Fogg v. Blair*, 139 U. S. 118 (1891); or *Handley v. Stutz*, 139 U. S. 417 (1891), was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands." *Camden v. Stuart*, 144 U. S. 104 (1892); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892); *Libby v. Mt. Monadnock, etc. Co.*, 32 Atl. Rep. 772 (N. H., 1894); *Nenny v. Waddill*, 6 Tex. Civ. App. 244 (1894).

Persons taking stock from the corporation for cash at forty cents on the dollar cannot avoid liability to corporate creditors for the remaining sixty cents by setting up that unknown to them the stock had previously been issued to a contractor

rate agents to the person receiving the stock, that full payment will not be required, is immaterial, and constitutes no defense.¹

In order to enforce a liability where stock is issued as full-paid stock for cash at less than the par value, it is not necessary to prove that fraud entered into the transaction, since there is no possibility of mistaken judgment as to the value of the thing received in payment.² Stock, however, which is purchased by the corporation, after its original issue, may be sold by the corporation at a discount. The corporation may then sell the same as an individual stockholder.³

for work to be done, and that he appointed the corporation his agent to sell the stock at forty cents on the dollar. The subscription to the stock was an original subscription and bound them. *Bates v. Great Western Tel. Co.*, 134 Ill. 536 (1890).

Where property is sold to the company for stock and cash, the cash may be credited on other subscriptions. *Re Jones, etc. Co.*, L. R. 41 Ch. D. 159 (1889).

Where stock is issued for cash at fifty cents on the dollar by a corporation, corporate creditors may compel the stockholders to pay the remaining fifty cents. *Guerney v. Moore*, 131 Mo. 650 (1895); *Barron v. Burrill*, 86 Me. 66 (1893).

¹ *Upton v. Tribilcock*, 91 U. S. 45 (1875); *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859).

² *Flinn v. Bagley*, 7 Fed. Rep. 785 (1881).

It has been held that the custom of the country will exempt stockholders from liability on stock issued as paid up when it was not paid up. Such a decision, however, is inconsistent with the great weight of authority, and must be considered poor law.

Re South Mountain, etc. Co., 7 Sawyer, 30 (1881); S. C., 5 Fed. Rep. 403. In this case it is stated that corporate creditors were protected

"by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation." See comments on this case, *supra*, § 30. The English rule is now the same as the American. See § 34, *supra*.

³ *Otter v. Brevoort Petroleum Co.*, 50 Barb. 247 (1867); *Ramwell's Case*, 50 L. J. (Ch.) 827 (1881), where the stock came to the corporation by forfeiture. See also § 29, *supra*. In many cases stock is issued to a patentee for his patent, and he then donates and turns back to the corporation a part of this stock to be sold at a reduced price for the benefit of the corporate treasury. *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882). This transaction is legal; and it is not at all necessary that the stock so donated be placed in the names of trustees for the benefit of the corporation. It may be transferred to the corporation direct. In *Stribbling v. Bank of the Valley*, 5 Rand. (Va.) 132 (1827), where the bank took a note for its own stock at a price in excess of the market value of the stock, the court held the note to be usurious.

It is a question for the jury whether fraud exists in sale of stock, represented to be paid up, when part of the payments had been by dividends from the corporation. *Kryger v. Andrews*, 65 Mich. 405 (1887).

But where the corporation has an

The amount collected must be to the extent and for the purpose of paying corporate creditors' claims only.¹ A resolution discharging stockholders from all liability on stock after thirty per cent. of the par value has been paid, and then suffering a forfeiture of the stock, is void so far as corporate creditors are concerned.²

It is legal for the company to pay a cash commission to a person who procures subscriptions, even though that commission is deducted from the subscription price.³

Where one company sells property to another company the consideration may be stock of the latter company and also a

accumulated profit, and that profit is by agreement with the stockholders applied to unpaid subscriptions, such stock is then paid up. *Kenton, etc. Co. v. McAlpin*, 5 Fed. Rep. 737 (1880).

Where the capital stock is reduced, and subscribers cancel unpaid subscriptions and take paid-up stock to the extent of their payments on the old stock, old corporate creditors may hold them liable on the former. *Re State Ins. Co.*, 14 Fed. Rep. 28 (1882).

The presumption is that a corporate creditor did not know and acquiesce in the issue of "watered" stock. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417.

As affecting corporate creditors herein, the statute of limitations does not commence to run until judgment is recovered by the corporate creditors against the corporation. *Christensen v. Quintard*, 36 Hun, 334 (1885).

For other cases on the right of corporate creditors to sue, see § 735, *infra*.

¹ *Suovill v. Thayer*, 105 U. S. 143, 155 (1881).

² *Slee v. Bloom*, 19 Johns. 456 (1822).

³ In *Metropolitan, etc. Assoc. v. Scrimgeour*, 73 L. T. Rep. 137 (1895), a commission of five shillings per share on preferred stock and sixpence per share on common stock paid to brokers was held to be legal although

the practical result was the issue of stock below par.

A corporation may agree to give \$5,000 of stock to one who will borrow \$15,000 for it. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889).

A commission of fifteen per cent. may be paid by the company to those who agree to take all the stock not subscribed for by the public. *Re Licensed Victuallers', etc. Assoc.*, L. R. 42 Ch. D. 1 (1889).

Stock for \$59,800 issued to a person as a commission for selling \$85,000 of bonds does not necessarily render him liable, there being no subscription by him. Unless fraudulent overvaluation is proven he is not liable, and even if liable is liable only for the market value of the stock. *Jones v. Whitworth*, 94 Tenn. 602 (1895).

In *McNulta v. Corn Belt Bank*, 164 Ill. 427 (1897), the president sued to recover a two and a half per cent. commission which had been voted by the directors to him on unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect.

A company may be liable for a commission which it agrees to pay for the sale of its stock. *Mason v. Morin*, 42 S. W. Rep. 88 (Ky., 1897).

right on the part of stockholders in the former company to subscribe for stock in the latter company below par.¹ Where stock is given by the company gratuitously as a "bonus" to persons who are induced thereby to purchase the bonds of the company, it has been held that such persons are liable to corporate creditors for the par value of such stock.²

But in New York a different rule prevails and the stockholder is not liable.³

¹ *Re Common Petroleum Eng. Co.*, [1895] 2 Ch. 759.

² A "bonus" of paid-up stock to a director who loans money to the company and takes its notes and bonds as collateral is not legal, the issue of the stock being the original issue. The court, in a *dictum*, stated that the director was liable for the full par value of the stock. *Richardson v. Green*, 133 U. S. 30 (1890).

Persons purchasing bonds from a company and taking stock as a "bonus," the stock being unissued until that time, are liable for the par value of the stock. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890), reversed on other grounds, *Handley v. Stutz*, 139 U. S. 417 (1891); *Haldeman v. Ainslie*, 82 Ky. 395 (1884).

Where the stockholders increase the stock and distribute part of it among themselves as full-paid stock, but give nothing for it, they may be held liable by corporate creditors for the par value thereof. *Handley v. Stutz*, 139 U. S. 417 (1891); *Skrainka v. Allen*, 76 Mo. 384 (1882).

In *Hebberd v. Southwestern, etc. Co.*, 36 Atl. Rep. 122 (N. J., 1896), where bonds with a bonus of stock had been issued, the court held that as against the parties receiving the bonds the liability on the stock could be offset against the amount due on the bonds, the company having become insolvent.

In a suit for contribution in the federal court by a Missouri stockholder, who has been compelled by

the Missouri courts to pay for stock issued to him as a "bonus," the court will follow the Missouri decision rather than a New York decision holding that the same "bonus" created no liability. *Allen v. Fairbanks*, 45 Fed. Rep. 445 (1891).

Where for every dollar for value of bonds sold at par the company gives to the purchaser an equal amount of stock as a bonus, the persons receiving such stock are liable on it in case of corporate insolvency. *Re Railway, etc. Pub. Co.*, 68 L. T. Rep. 649 (1893).

A distribution gratis of stock among the stockholders has been held to be an unauthorized reduction of the capital stock, and it will be ordered to be returned. *Holmes v. Newcastle, etc. Co.*, 45 L. J. (Ch.) 383 (1875).

³ In New York it is held that unissued shares of stock may be issued gratuitously to stockholders; also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agree to pay therefor or the statute requires payment. A subscription is otherwise, since it is a contract. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for the amount received from the sale. He has received nothing from the corporation except a promise to pay. (*Skrainka v. Allen*, 7 Mo. App. 434 (1879), S. C., 76 Mo. 384 (1882), not followed.) *Christensen v. Eno*, 106 N. Y. 97 (1887);

Where a railroad corporation is in financial straits and its stock worth nothing, it is legal for the corporation to settle with one of its creditors by issuing stock to him at twenty cents on the dollar. Other corporate creditors cannot afterwards hold him liable for the remaining eighty cents on the dollar.¹ And it is now established law that an embarrassed corporation may, upon an increase of its stock, put such stock upon the market and sell it for the best price that can be obtained, and that the corporation may throw in as a bonus a certain amount of full-paid stock to the purchaser of its bonds, and there will be no liability on the stock.²

Christensen v. Quintard, 8 N. Y. Supp. 400 (1890). See also § 73, *infra*.

¹ *Clark v. Bever*, 139 U. S. 96 (1891). After deciding that nothing in the Iowa statute forbids the issue of stock below par, the court says:

"If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is 'unpaid,' it would have been easy to so declare, as has been done in some of the states. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the legislature."

A limitation on the extent of this case is laid down in that the stockholders are liable, "unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint." Affirming *Clark v. Bever*, 31 Fed. Rep. 670 (1887). To same effect, *Morrow v. Iron, etc. Co.*, 87 Tenn. 262, 276 (1888).

² *Handley v. Stutz*, 139 U. S. 417 (1891). The court said: "To say that a corporation may not, under the cir-

cumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. . . . The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained."

In *Rickerson, etc. Co. v. Farrell, etc. Co.*, 75 Fed. Rep. 554 (1896), the court held that an issue of an increase of capital stock at fifty cents on the dollar renders the holders liable to subsequent creditors for the remaining fifty cents on the dollar, even though the capital stock of the corporation, at the time of the issue, had become impaired and the stock was worth only fifty cents on the dol-

Only creditors who become such after an issue of watered stock was made can complain of the issue and hold the stockholders liable. Prior corporate creditors could not have extended credit on the faith of a subsequent issue of stock.¹

Creditors who become such after the bonds were issued cannot attack the validity of the bonds on the ground that they were issued for less than their real value together with a large amount of stock.² As against creditors the company's agreement that stockholders would not be called upon to pay more than thirty per cent. of their subscription is not valid except as against creditors who had notice thereof.³

In Minnesota and elsewhere the doctrine is clearly and boldly announced that the issue of stock for cash at less than par is legal, and that nothing more can be collected on such stock, except by corporate creditors who have relied, or can fairly be presumed to have relied, on the representation that the capital stock is as stated; in other words, that it was paid in full.⁴

lar. The court distinguished *Handley v. Stutz*, on the ground that in the latter case the corporation was insolvent and the stock was issued to a creditor in cancellation of his debt and at a value in excess of the actual market value, and that the corporation in that case was not a going corporation. The court held that subsequent creditors who became such, knowing of the issue below par, could not enforce collection of anything further, but that subsequent creditors who became such without notice could enforce the payment of the balance. The court in a *dictum* stated that stock issued for property as full paid would be considered full paid unless there was actual fraud, and that gross and obvious overvaluation of property would be merely strong evidence of fraud.

An issue of increased capital stock for cash at twenty cents on the dollar is legal where the corporation is insolvent and the issue was largely in payment of debts. *Peter v. Union, etc. Co.*, 46 N. E. Rep. 894 (Ohio, 1897).

The bonds of a failing corporation and the mortgage securing them are valid, although when the bonds were issued a large amount of increased capital stock was given by the corporation as a bonus with the bonds. The giving of the bonus is no defense to a foreclosure of the mortgage, it being shown that the corporation was nearly insolvent at the time such increased capital stock was issued. *Dummer v. Smedley*, 68 N. W. Rep. 260 (Mich., 1896), the court relying on the authority of *Handley v. Stutz*, 139 U. S. 417.

¹ *Handley v. Stutz*, 139 U. S. 417 (1891); *Coit v. North Carolina Gold Amal. Co.*, 14 Fed. Rep. 12 (1882); *aff'd*, *Coit v. Gold Amal. Co.*, 119 U. S. 343 (1886). See also cases cited in § 46, *infra*. *Cf.* 50 N. E. Rep. 19 (Ill., 1898).

² *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897).

³ *Martin v. South, etc. Co.*, 26 S. E. Rep. 591 (Va., 1897). See also § 46, *infra*.

⁴ The basis of the creditor's suit is not contract, but fraud. Creditors

A creditor may, by express contract, waive his right to compel stockholders to pay their unpaid subscriptions.¹

Inasmuch as a corporation may pledge its unissued stock to a corporate creditor, the pledgee cannot be held liable thereon on the ground that the stock was "watered."²

Where stock has been issued as full paid, without any money or property being paid therefor, a judgment creditor's remedy is in equity and not at law.³

In England there has been great doubt on this subject. It formerly was held that, where a contract for the issue of stock for cash at a discount is regularly registered with the public registrar, as provided by statute, then the person to whom the stock was thus issued by contract as paid-up stock was not liable to the corporation, nor corporate creditors, nor any other per-

who were such before the watered stock was issued cannot complain of it. Nor can a subsequent creditor complain if he knew of the issue of watered stock. Nor will one who purchased claims after the corporation became insolvent and a receiver was appointed be allowed to complain. *Hospes v. Northwestern, etc. Co.*, 48 Minn. 174 (1892). Although for every share of stock subscribed and paid a corporation issues five shares, yet a subscriber who pays for his stock but does not receive any certificate at all is not liable to corporate creditors on the watered stock, which he supposed he was entitled to, and he is not liable, even though other subscribers who actually took their certificates have been held liable on the whole of them. *Rogers v. Gross*, 69 N. W. Rep. 894 (Minn., 1897); *Rickerson, etc. Co. v. Farrell, etc. Co.*, 75 Fed. Rep. 554 (1896); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892). Where stock is issued for no consideration whatever the transaction is void and the holder of the stock is not liable thereon. *Kellerman v. Maier*, 116 Cal. 416 (1897). In Canada it is held that subscribers for stock at a discount are not liable even in winding-up proceedings, where such

issue of stock was in violation of the charter. *Re Ontario Ex. & Trans. Co.*, 21 App. Rep. (Can.) 646 (1894).

¹ *Bush v. Robinson*, 95 Ky. 492 (1894).

² See § 465 and § 763, *infra*.

Unissued stock may be issued by the corporation as a pledge to secure a loan, and the corporation cannot set up that it was issued at less than par in violation of the constitution. The issue is good in the hands of the pledgee to the extent of the loan. *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 496 (1892).

Where a corporation pledges its stock as security for a debt due from the corporation to the pledgee, and the certificates of stock state upon their face that they are full paid, the pledgee cannot be held liable on said stock even though the company has become insolvent. *Bloomenthal v. Ford*, [1897] A. C. 156; *rev'g Re Monnier*, [1896] 2 Ch. 525.

A constitutional provision against the issue of bonds, except for money, labor or property, does not prevent the corporation from pledging its bonds. *Illinois, etc. Bank v. Pacific R'y*, 117 Cal. 332 (1897).

³ *First Nat. Bank v. Peavey*, 69 Fed. 455 (1895).

son, for the unpaid par value of the stock, and his transferee was likewise protected.¹

The latest authority in England, however, is in accord with the American rule, and holds that stock cannot be issued for cash at a discount.² A stock dividend may take the shape of an issue of stock for cash at less than the par value.³

¹ *Re Ince Hall Rolling Mills Co.*, L. R. 23 Ch. D. 545, n. (1882). The court refused to hold liable the person receiving the stock, but in a *dictum* said: "Assuming that the contract was *ultra vires*, what would be the result? If it is *ultra vires* it must be set aside *in toto*, the consequence being that these gentlemen would be entitled to be relieved of their shares and receive back the money paid upon them." In the case of *Guest v. Worcester, etc. R'y*, L. R. 4 C. P. 9 (1868), where stock had been issued as paid-up stock to a corporate creditor as security for his debt, nothing having been paid on such stock, the court said it did "not entertain a shadow of doubt," and that the holder was not liable thereon. In *De Beville's Case*, L. R. 7 Eq. Cas. 11 (1868), "paid-up" shares had been issued to De Beville, who had subscribed for "paid-up" shares, but had paid no part of the par value thereof. The court held him not liable. In this case the corporation had authority to issue ordinary shares for cash, and "paid-up" shares for property or services. See also *Re Gold Co.*, L. R. 11 Ch. D. 701 (1878); *James v. Eve*, 6 H. L. Cas. 335 (1873); *Re Plaskynaston Tube Co.*, L. R. 23 Ch. D. 542 (1883). *Ex parte Daniell*, 1 De G. & J. 372 (1857), is not strictly in accordance with the preceding authorities, but in Daniell's case the issue was to a director who was acting in a fiduciary capacity. The case is so distinguished in *Carling's Case*, L. R. 1 Ch. D. 115 (1875).

In *Re Dronfield Silkstone Coal Co.*, L. R. 17 Ch. D. 76, 97 (1880), the court says: "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders." See also *Re Ambrose Lake, etc. Min. Co.*, L. R. 14 Ch. D. 390 (1880); *Re Ince Hall, etc. Co.*, L. R. 23 Ch. D. 545, n. (1882), where the court said the same as in the preceding case. In *Waterhouse v. Jamieson*, L. R. 2 H. L. (Sc.) 29, 37 (1870), the court said: "I take it to be quite settled that the rights of creditors against the shareholders of a company, when enforced by a liquidator, must be enforced by him in right of the company. What is to be paid by the shareholders is to be recovered in that right." *Cf.* remarks of the lord chancellor, page 32.

² *Ooregum, etc. Co. v. Roper*, 66 L. T. Rep. 427 (1892); *Welton v. Saffery*, [1897] A. C. 299; *Re Addlestone, etc. Co.*, L. R. 37 Ch. D. 191 (1887). In *Ex parte Stephenson*, 15 L. R. Ir. 51 (1885), it was held that, upon dissolution of the corporation, the stockholders are entitled to the remaining assets in proportion to the amounts paid by them, without regard to the "water" in the stock.

An issue of stock in England for cash at less than par is invalid, even though the contract is duly registered under the Companies Act. The holders are liable for the unpaid par value. *Re London Celluloid Co.*, L. R. 39 Ch. D. 190 (1888).

In England an issue of stock for

³ *Re Owen, etc. Co.*, 21 Ont. Rep. (Can.) 349 (1891).

§ 43. *Corporate creditors as complainants where the issue is for property or construction work.*—The rights of corporate creditors, where stock has been issued for property taken at an overvaluation, are considered elsewhere.¹

§ 44. *Who is liable and the character of the liability—Liability of the corporation.*—The corporation itself, it has been intimated, is not liable to any person by reason of the issue of its stock as full-paid stock, when, as a matter of fact, it has not been fully paid.² It is very certain that the stockholder has no remedy herein against the corporation, since his remedy is against the corporate officers, as in other cases of breach of trust by them. As regards corporate creditors, they cannot complain provided the corporation remain solvent and able to pay its debts. If, on the other hand, it becomes insolvent, it would be no object to them to bring suit against the corporation.

§ 45. *Liability of persons to whom stock is issued for cash at less than par.*—Where stock is issued for cash at less than par, the parties taking it are liable to corporate creditors for the

cash at a discount is illegal, and a holder may sue to rescind the issue to him and for repayment of the money paid. *Re Almada, etc. Co.*, L. R. 38 Ch. D. 415 (1888), overruling *Re Ince Hall, etc. Co.*, L. R. 23 Ch. D. 545, n. (1882), and *Re Plaskynaston, etc. Co.*, L. R. 23 Ch. D. 542 (1883).

A person subscribing for and taking stock for cash at less than par cannot repudiate the same and cancel the subscription on the ground that he supposed that the issue was legal. *Re Railway, etc. Pub. Co.*, L. R. 42 Ch. D. 98 (1889). *Cf. Re Zoedone Co.*, 60 L. T. Rep. 383 (1889); *Re Midland, etc. Co.*, 60 L. T. Rep. 666 (1889).

An agreement of the company that stock may be issued at a certain figure below par is not such a “contract” as upon being duly filed authorizes such an issue. *Re New Eberhardt Co.*, L. R. 43 Ch. D. 118 (1889). A subscriber for one share of stock is liable thereon, although afterwards a contractor to whom stock is issued

for property transfers to the former one full-paid share of stock to fulfill the subscription. *Dalton Time Lock Co. v. Dalton*, 66 L. T. Rep. 704 (1892). Persons taking stock for cash at a discount are liable for the difference on a dissolution and distribution, even though all creditors have been paid. *Re Railway, etc. Pub. Co.*, 71 L. T. Rep. 682 (1894).

¹ See §§ 46, 47, and note 1, p. 1718.

² In the case of *In re Ambrose Lake, etc. Min. Co.*, L. R. 14 Ch. D. 390, 397 (1880), the court says: “There would be no liability on the part of the company as such.” In *Re Gold Co.*, L. R. 11 Ch. D. 701 (1879), where the proceeding was to compel a winding up of the company on account of an improper issue of paid-up stock, the court refused to support the proceeding, and said (p. 713): “It was not a wrong done by the company or to the company.” See also *Lewis v. Meier*, 14 Fed. Rep. 311 (1882). *Cf. § 157, infra.*

unpaid par value thereof,¹ unless the issue was subsequent to the commencement of business and the real value of the stock was paid in to the corporation in order to enable it to go on with its business instead of becoming insolvent.²

§ 46. *Liability of persons to whom stock is issued for property taken by the corporation at an overvaluation*³—*Treasury stock*.—A dissenting stockholder may object to such an issue, inasmuch as it decreases the value of his stock. He may have the transaction set aside, and the person receiving the stock compelled to return it.⁴ The person receiving stock at a discount is liable also to a *bona fide* transferee of that stock where fraud enters into the transaction.⁵

Corporate creditors, however, are the persons who generally complain. The company becomes bankrupt and they are not paid. They then find that the capital stock did not represent cash; it was paid for by property taken by the corporation at a valuation much greater than its real value. The company being insolvent and its property gone, the corporate creditors seek to hold the stockholders liable. They seek to hold the stockholders liable for the par value of the stock, less the real value of the property which was turned in to the corporation. During the past ten years there has been a vast amount of litigation on this subject. The courts still disagree in their conclusions, but a careful study of the cases will show that upon authority as well as principle the stockholders cannot be held liable in such a case. In England and New York they cannot be held liable at all, except on the basis of a rescission. And under all the well-considered decisions they cannot be held liable unless the property was of so trifling a character that it practically had no value whatever. This class of cases has arisen under two aspects: first, at common law; and second, under statutes.

At common law it is well settled that corporate creditors cannot hold stockholders liable on stock which has been issued for property, even though the property was turned over to the cor-

¹ See § 42.

⁴ See § 41.

² See § 42.

⁵ See § 40, and *Fisher v. Seligman*,

³ For the decisions upholding issues of stock for property at a fair valuation, see §§ 18, etc., *supra*. 7 Mo. App. 383 (1879).

poration at an agreed valuation which was largely in excess of the real value of the property. There have been cases which refuse to follow this rule, but it is clearly established by the great weight of authority. The reason of the rule is that if the payment by property was fraudulent, then the contract is to be treated like other fraudulent contracts. It is to be adopted *in toto*, or rescinded *in toto* and set aside. Both parties are to be restored as nearly as possible to their original positions. The property or its value is to be returned to the person receiving the stock, and he must return the stock or its real value. In New York and in England, as stated above, at common law the stockholder is not liable at all to corporate creditors, even though the overvaluation was gross and clearly known so to be. The remedy is rescission, and not the making of a new contract by the court. There are other cases, however, which hold that where the property so turned in had no substantial value, or where the overvaluation was "fraudulent," the court will hold the stockholders liable for the par value of the stock, less the value of the property. These cases, however, are generally overcome by the further rule that the stock had no value when it was issued for property. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Such is the language of the supreme court of the United States.¹

¹ *Federal courts*: Fogg v. Blair, 139 U. S. 118 (1891), holding that where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds without the stock were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. The court said (p. 126): "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule.

343 (1886), *aff'g* Coit v. North Car. Gold Amal. Co., 14 Fed. Rep. 12 (1882), where this question clearly arose, the court said that the creditors could not hold the stockholders liable unless there was an intentional and fraudulent overvaluation. The court said that "where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account; a gross and obvious overvaluation of property would be strong evidence of fraud." The court held that although a machine and a license to use a patent were put into the company in payment for \$100,000 of stock, yet there was no fraud.

In Coit v. Gold Amal. Co., 119 U. S. Before any recovery can be had in

There is no contract, express or implied, to pay to the corporation or to corporate creditors the par value of stock which is issued for property. Not only is there no contract, but there is no implied fraud in such a transaction. If there is express

this class of cases the transaction must be set aside. *Scovill v. Thayer*, 105 U. S. 143, 156 (1881).

A person who has obtained options on several plants may legally sell them to a corporation for stock at such a valuation for the plants as may be agreed upon. Where the plants are turned in for mortgage bonds and stock, it is no defense to the foreclosure of a mortgage that the stock was all water. The court said: "Assuming that the stock of the new company was of par value, and that the plants were worth only the prices fixed upon them in the several options, of course there would appear to be an overvaluation in the sale. But this is an assumption that would scarcely be warranted. Probably there was not much market value for the stock, especially the common and unpreferred stock. It was supposed that the new enterprise would make the plants more valuable, so that the value of any plant before the transfer would not be evidence of its value after the consolidation should be completed. Every one interested proceeded with his eyes open, and it was entirely competent to make such a contract as they might agree upon. There was no compulsion practiced and no evidence of fraud. The mill owners could set such valuation upon their plants as they chose, or as they could agree upon with those taking the options. The holders of options and the new company, in the absence of fraud, could do the same thing and make such bargain for the transfer as they saw fit." *Dickerman v. Northern T. Co.*, 80 Fed. Rep. 450 (1897); *aff'd Northern Trust Co. v. Columbia, etc. Co.*, 75 Fed. Rep. 936.

In *Northwestern, etc. Ins. Co. v. Cotton, etc. Co.*, 70 Fed. Rep. 155 (1895), a building company having invested \$88,000 in a building sold it to a new corporation having the same stockholders for \$125,000 stock and \$75,000 of bonds. The property on foreclosure brought only \$50,000. A creditor sued to hold a stockholder liable on his stock. The court held that he could not recover, because (1) "if the real estate transferred for the stock in the new corporation was honestly believed by the parties to the transaction to be equivalent in value to the face of the stock issued, a creditor of the corporation may not assail the transaction, although it should subsequently transpire that the property in fact was overvalued;" and (2) the creditor, "when it became the purchaser of the bonds, was advised of the valuation placed on the property by the directors, and was in possession of other important facts, which, if pursued, would have led to full knowledge of the method pursued by the directors in the said transfer, the fixing of the valuation, and the manner of payment of the cash subscription."

Where an agent is entitled to all that land is sold for above \$50,000, and a sale is made for \$10,000 cash and \$44,000 in stock, par value, he must prove what the stock was worth. He cannot assume that it was worth par. *Anderson v. Avis*, 62 Fed. Rep. 227 (1894).

Where a corporation issues its stock, as full paid, in payment for coal lands, and the stock is sold to a purchaser for value, the purchaser is not liable to creditors of the corporation on the stock on the ground that it is not full-paid stock, even though

fraud the law provides ample remedies, but such a fraud must be clearly proven and is not implied from proof that the property was worth far less than the par value of the stock.

This principle of law, that there is no liability on stock issued

the land was taken at a great over-valuation, there being no actual fraud in the transaction. The text as stated above was quoted with approval. *Du Pont v. Tilden*, 42 Fed. Rep. 87 (1890).

In the case *Stewart v. St. Louis*, etc. R. R., 41 Fed. Rep. 736 (1887), where a railroad road-bed worth \$2,000 was turned in to a corporation for \$200,000 of its notes and \$3,600,000 of its stock, the court held that the notes were good and could be collected. See 86 Fed. Rep. 929 (1898).

In *Phelan v. Hazard*, 5 Dill. 45 (1878); S. C., 19 Fed. Cas. 429, Judge Dillon thoroughly reviews the authorities, and says: "The contract is valid and binding upon the corporation and the original share-takers, unless it is rescinded or set aside for fraud; and . . . while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as a payment which the parties have agreed should be payment." See also *Morrison v. Globe Panorama Co.*, 28 Fed. Rep. 817 (1886); *Coe v. East*, etc. R. R., 52 Fed. Rep. 531 (1892).

Inasmuch as the franchise, earning power or good-will is generally turned in at a high valuation, it is well to state that the law sustains a fair valuation of the franchise. Thus, where the national government condemns a dam and lock of a canal company, it must pay not only the cost of the dam and lock, but compensation for the taking of the franchise to exact and collect tolls. "The whole value must be paid, and that value depends largely upon the productiveness of the property, the franchise to take tolls." *Monongahela*

Nav. Co. v. United States, 148 U. S. 312 (1893).

New York: In Van Cott v. Van Brunt, 82 N. Y. 535 (1880), a leading case, the court said (p. 542): "The conclusion of law was erroneous that the scheme was fraudulent as against the company and against the creditors, and that the defendants were only entitled to credit for the actual outlay paid or incurred, and were liable for the amount unpaid on the stock. The result must be that the defendant was not liable to pay the par value of the stock received by him under the contract for building and equipping a portion of the road." This case has been severely criticised as being contrary to established principles of law; but, as a matter of fact, it is in strict accordance with the law as now established.

It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." *Barr v. New York*, etc. R. R., 125 N. Y. 263 (1891).

Parties owning real estate may convey it to a corporation formed for that purpose and take bonds in payment, all assenting. "No just criticism is possible either upon the legality or morality of the transaction. Evidence was given to show that the land conveyed was not worth the

for property the value of which is less than the par value of the stock, is perhaps a fiction of the law. And yet this fiction is based on business usage and is sound in principle and practice. There is no more harm in the issue of stock below par

sum secured, but that is a totally immaterial fact. Whatever the price, it wronged no one and could wrong no one." *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895).

The issue is valid unless the property was fraudulently overvalued. *Powers v. Knapp*, 85 Hun, 38 (1895). See also *Continental Tel. Co. v. Nelson*, 49 N. Y. Super. Ct. 197.

In *Flynn v. Brooklyn City R. R.*, 9 N. Y. App. Div. 269 (1896), where a West Virginia corporation issued its capital stock of \$30,000,000 in payment for the shares of stock purchased by it in certain street railway companies in Brooklyn, New York, the court said: "There is doubtless an element of stock-jobbing or stock-watering in the scheme, the issue of \$30,000,000 of traction stock at fifteen cents on the dollar, but this is not condemned by the laws of this state as to railroad companies. It is forbidden as to certain corporations, but there is no such general legislation on the subject that we can say it is condemned by the public policy of the state, whatever may be our own notions as to its wisdom and propriety."

In *Einstein v. Rochester Gas, etc. Co.*, 77 Hun, 149 (1894), a new company issued five shares of its stock for every share of an old company purchased by the former company.

Where a statute authorizes the consolidation of gas companies, and provides that the stock of the new company shall not exceed the "fair aggregate value" of the property and franchises of the old companies, a stockholder of one of the old companies may enjoin a consolidation if the stock of the consolidated com-

pany exceeds the net value of the property and franchises of the old companies in excess of their liabilities. *Langan v. Francklyn*, 20 N. Y. Supp. 404 (1892).

In *Re East River Bridge Co.*, 75 Hun, 119 (1894), the court refused to exercise its discretion given by statute as to authorizing an elevated road in the streets, where the charter allowed the company to issue stock at less than par by allowing the issue on such terms and in such manner as the directors deemed proper.

As to the statutory law in New York, see § 47, *infra*.

Indiana: Where \$197,000 in stock and \$150,000 in bonds are issued to contractors for the construction of water-works, the company at the time having no debts and everybody assenting to it, and there being no proof of fraud, the transaction is legal, and creditors cannot enforce any liability on the stock. *Bruner v. Brown*, 139 Ind. 600 (1894).

In *Coffin v. Ransdell*, 110 Ind. 417 (1887), the court sustained the rule given in the text, and said: "Suppose it to be true that, in consummating the arrangement, the property of Unthank & Coffin was turned in to the corporation at an overvaluation, and that the defendant and the other corporators participated in the alleged wrong. The transaction was the result of an agreement which the parties had the right, as between themselves, to make. . . Shall [defendant] be capriciously punished by being made liable *ex contractu* upon a contract which he never made? If the defendant has participated in a fraud whereby the creditors of the corporation who exercised ordinary

than there is in the issue of a note or bond below par. The extent to which the courts have gone in sustaining such issues of stock for property is shown by the fact that even constitutional and statutory prohibitions against watered stock have been

business sagacity have suffered damage, whatever redress such creditors may now obtain, while their representative retains the defendant's property, must be sought by an action *ex delicto*."

Where stock is issued for construction work, the persons receiving the stock cannot be held liable on the theory of the stock not having been paid up, unless fraud is charged and proved. The statements of one of the officers to tax commissioners are not admissible as evidence of the cost of the work. The act of the company in crediting each of the directors with one thousand dollars on their subscriptions in payment of services rendered and money advanced was upheld. *Clow v. Brown*, 31 N. E. Rep. 361 (Ind., 1892).

As to the statutory law in Indiana, see § 47, *infra*.

Maryland: See *Brant v. Ehlen*, 59 Md. 1 (1882), fully explaining the meaning of the term "trust fund" as applied herein. *Crawford v. Rohrer*, 59 Md. 599 (1882).

Michigan: Stock may be issued for services but not for influence. A person receiving \$2,500 of paid-up stock for recommending the company's product and using his influence to sell the product, but not devoting appreciable time, must pay the \$2,500 to corporate creditors, upon corporate insolvency. *Peninsular Sav. Bank v. Black Flag, etc. Co.*, 105 Mich. 535 (1895); 75 N. W. 932.

New Jersey: Where the stock of a cemetery company of the par value of \$50 is worth but \$5, the directors may issue it for land which is liable to come into competition with the company, even though one motive of the directors is thereby to control an

election. *Wildes v. Rural Homestead Co.*, 54 N. J. Eq. 668 (1896), rev'g 32 Atl. Rep. 676.

Stockholders cannot be held liable for the difference between the par value of their stock and the actual value of property turned in to the corporation in payment of the stock, unless fraud is proved. "If the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. . . . The valuations of property in making the exchange, either on the one side or the other, cannot be supervised or controlled by the court of chancery; for, in the absence of deceit, or some other corrupt constituent, the bargain between the parties cannot be disturbed." *Bickley v. Schlag*, 46 N. J. Eq. 533 (1890).

A few cases seem to be in conflict with the above authorities. Thus, in *Wetherbee v. Baker*, 35 N. J. Eq. 501 (1882), the defendant neither owned nor conveyed to the corporation the property which he alleged constituted payment. *Savage v. Ball*, 17 N. J. Eq. 142 (1864), held that the validity of an election is not affected by the question whether the stock voted was issued for value or not.

As to the statutory law in New Jersey, see § 47, *infra*.

New Mexico: Where there is a difference of opinion as to the value of the land which is deeded in payment for stock and no fraudulent intentional overvaluation is proved, the stockholder cannot be held liable on the stock. *Medler v. Albuquerque, etc. Co.*, 6 N. M. 331 (1892).

North Carolina: In North Carolina it has been held that the value of the

practically construed away by the courts. Moreover, the laws of trade are more powerful than the laws of men, and in business circles it has become customary to capitalize property at a reasonably high figure. This is due to the fact that it is easier

property turned in in payment for the stock may be ascertained by the court, and the stockholders held liable for the par value of the stock less the real value of the property, if such property was fraudulently overvalued. *Clayton v. Ore Knob Co.*, 109 N. C. 385 (1891).

Ohio: Where an insolvent partnership transfers its assets to a newly-created corporation in payment for its shares of stock, and the corporation *assumes all the debts* of the partnership, the payment for the stock is fraudulent *per se*. A corporate creditor may hold the stockholders liable on the subscription as though no payment had been attempted. *Sayler v. Simpson*, 4 R'y & Corp. L. J. 195 (1888).

It has been held that the person receiving the stock becomes liable for profits made thereby. *Four Mile, etc. R. R. v. Bailey*, 18 Ohio St. 208 (1868).

As to the statutory law in Ohio, see § 47, *infra*.

Pennsylvania: In the case of *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa., 1898), where stock and bonds had been issued by the corporation for land, but the stock had no market value, and an effort was made to hold the vendor of the land liable for the par value of the stock and the actual value of the bonds less the actual value of the land, the court refused, and said: "We do not concur with the master in his conclusion that Kase should refund to the company a large sum of money in excess of the profit, because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not per-

form the duties of a court of quarter sessions; does not order restitution of that which is valuable, and also impose a heavy fine on the guilty. The company has the land, Kase has a profit of \$111,000 bonds, and no profit in the worthless stock. He should account for the bonds alone."

In this case the court held that at common law, even though a railroad corporation issues to its president nearly \$1,400,000 of mortgage bonds and \$700,000 of stock for construction work which costs only about \$700,000, nevertheless the purchasers of such stock and bonds cannot cause suit to be brought by the corporation after the foreclosure of its property, and hold him liable. The court held that inasmuch as the stock had no market value no harm was done. The court said: "Nor is it true that those who took the stock and bonds, and paid money for them, were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays seventy-five or eighty cents on the dollar for a seven or eight per cent. railroad bond, receiving with the bond a gift of the stock, in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew, that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meritorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did

to sell stock at less than par than at par, and also to the fact that, by a large capitalization, dividends are kept low enough to avoid the cupidity of possible competitors and the interference of legislatures. To such an extent is this practice carried

not happen, the buyer lost; but he was not cheated, except in the sense that all who bet on the happening of an uncertain event, and lose, are cheated." In *Carr v. Le Fevre*, 27 Pa. St. 413 (1856), the court said that if the directors "took lands at a prospective value, never realized, it is nothing more than many individuals and corporations have done before. Such an error in management or in their judgment of the value of a purchase, made without fraud, forms no ground for rescinding the contract."

As to the statutory law in Pennsylvania, see § 47, *infra*.

England: In *Re Wragg*, [1897] 1 Ch. 796, Mr. Justice Lindley reviewed carefully the English authorities and held that although property of the value of \$75,000, as all parties knew at the time, was sold to a corporation for \$100,000 of stock issued as full paid, yet that the transaction was legal, there being no actual value on the stock and there being no actual fraud. The court held that a corporation could buy property and pay for services at any price it thought proper, and pay for them in fully paid-up shares, and provided that it did so honestly and not colorably, and provided that it had not been so imposed upon as to be entitled to be relieved from its bargain, agreements to pay for property or services in paid-up shares were valid and binding on the company and its creditors. To the same effect, *Larocque v. Beauchemin*, [1897] A. C. 358, where property worth \$10,000 was sold to a company and credit given on subscriptions to the amount of \$35,000. The statute in this case required payment in cash. Subscriptions were

made and payment was then made in property.

In *Anderson's Case*, L. R. 7 Ch. D. 75 (1877), stock was issued to a promoter for property taken at an overvaluation. This action was to render him liable for the par value of the stock, less the real value of the property. The court said, pp. 94, 95, 104: "I am not going to alter men's contracts unless the provisions of an act of parliament compel me to do so. . . . You cannot alter the contract to such an extent as to say, Though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and put you on the list of contributors on that ground. . . . If you set aside this allotment of shares, you must set it aside altogether, and then you cannot make the holder of them a contributory; and if you do not set it aside altogether you must adopt it, and the utmost you can do is, as I said before, that you can take away any profit from the person who has improperly made it." In *Currie's Case*, 3 De G., J. & S. 367 (1863), the court said that the transaction "was either valid or invalid. If valid, it is clear that neither he [the person receiving the stock] nor his alienees can be called upon to contribute in respect of these shares. If invalid, I cannot see my way to hold that either a court of law or a court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a court of law or to a court of equity to alter the terms of the purchase, and treat as shares not paid-up shares which were given as paid-up shares

of issuing stock for property at an overvaluation, that the investing public and persons who give credit to corporations rather expect it, and they no longer rely upon the nominal capitalization of the company. Experience has taught them that they must investigate the real financial condition of the company, and invest or give credit upon that alone.

The fact that the person to whom the stock is issued returns a part of it as a gift to the corporation or to trustees for the

in part consideration of the purchase. Fraud—assuming there was fraud—would of course warrant the court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any court to substitute other terms.” See also *Barnett's Case*, L. R. 18 Eq. 507 (1874), where the issue had been canceled by the corporation. See also *Schroder's Case*, L. R. 11 Eq. Cas. 131 (1870); *Mege's Case*, 10 W. N. (Eng.) 208 (1875); *Wood's Claim*, 30 L. J. Ch. 373 (1861).

In the important case, *Re Theatrical Trust*, 72 L. T. Rep. 461 (1895), a party sold to a corporation for \$30,000 in stock the benefit of certain copyrights and all his contracts in respect to theatrical agencies and other business connected therewith, and he agreed also to pay the expense of incorporation, and to serve as managing director for five years at a salary to be agreed upon. He had agreed to give his lawyer \$2,000 of the stock. He and his lawyer and two others were the directors who passed on the contract. The stock was issued to the lawyer directly from the company. The selling party did not turn over the copyrights and contracts as agreed. The company thereupon rescinded the agreement and canceled his stock, but did not cancel the lawyer's stock. The court held that there was no liability on any of the stock, not even for the benefit of creditors.

Where a company issues fully

paid-up stock to parties in payment for services rendered to the company in its formation and in establishing its business, such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re Eddystone M. Ins. Co.*, 68 L. T. Rep. 408 (1893); *aff'd*, 69 L. T. Rep. 363.

Where a manufacturer, engaged in business which he had carried on for thirty years, desires to turn it into a company so that his estate may be handled more readily, and consequently he incorporates a company for the purchase of the plant and business for £50,000, including £15,000 for the good-will, and he himself is the sole director and is practically the only stockholder, the transaction is legal. It is also legal for him to sell his stock, and he cannot be held liable to the company for turning the property in at an overvaluation. *Felix, etc., Ltd., v. Hadley*, 77 L. T. Rep. 131 (1897).

Canada: In *Re Hess Mfg. Co.*, 23 S. C. Rep. (Can.) 644, 654 (1894), the court said that there was no liability on stock which had been issued for property “unless a case of fraud was made and proved, which could only be done in a formal action to rescind.”

Even though the property is valued higher than what the vendor paid for it, yet he is not liable on stock turned out for it under the English common law as it existed prior to the Companies Act—30 & 31 Vict., ch. 131. *Jones v. Miller*, 24 Ont. Rep. (Can.) 268 (1893).

corporation to sell the same below par and put the proceeds in the corporate treasury for a working capital does not necessarily prove that the property was overvalued. The person receiving the stock may have been willing to sacrifice a part of his stock and property in order to make the rest more valuable.¹

Corporate creditors who become such before an issue of stock is made for property at an overvaluation cannot hold the stockholders liable in regard to such issue, inasmuch as those credit-

¹ *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882); *Williams v. Taylor*, 120 N. Y. 244 (1890); *American Tube, etc. Co. v. Hays*, 165 Pa. St. 489 (1895). See also §§ 42, 29, *supra*.

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par directly from the corporation to the person taking the bonus. The value of the property in this case was not proved. *Davis v. Montgomery, etc. Co.*, 8 S. Rep. 496 (Ala., 1890). In the case of *Van Gestel v. Van Gestel Electric Street Car Co.* (N. Y. L. J., July 3, 1890), the court enjoined a company from disposing of such stock contrary to the contract. In *Hey v. Dolphin*, 92 Hun, 230 (1895), patentees to whom stock was issued contributed a part of it to be sold on the market, and the proceeds given to the corporation. In *Kelley v. Fletcher*, 94 Tenn. 1 (1894), part of the stock which was issued for property was turned back as a gift to the corporation and then sold at less than par.

A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. *Kinsman v. Fisk*, 83 Hun, 494 (1895).

It is legal for persons to whom stock is issued for property to donate

a part of it to the treasury. *John, etc. Land Co. v. Cooke*, 44 S. W. Rep. 391 (Ky., 1898). A judgment creditor of a corporation may cause its treasury stock to be sold on execution. *Coit v. Freed*, 49 Pac. Rep. 533 (Utah, 1897).

Where five persons subscribe for \$50,000 of stock, and then become directors and turn in property in payment for such subscriptions, the transaction is legal, they being the only stockholders; and even though they donate the stock to the treasury and cause it to be sold at less than par, the purchasers are not liable on the stock. *Kellerman v. Maier*, 116 Cal. 416 (1897).

In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issued. If, however, in the re-issue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. *Belknap v. Adams*, 22 S. Rep. 382 (La., 1897).

Where the owner of oil lands agrees to convey them to a corporation for stock, and to give one-half of the stock to another party, who pays the vendor \$5,000 and pays to the corporation \$25,000, the \$25,000 is not to be credited as a payment by the vendor on his stock. *Pardee v. Sunset Oil Co.*, 56 Fed. Rep. 51 (1893).

ors did not rely on that part of the capital stock being paid in.¹ In no case can a corporate creditor complain where, at the time when he contracted with the company, he knew that the stock had been issued for property taken at an overvaluation.²

There are decisions, however, to the effect that there is a limit beyond which the courts will not go in sustaining the issue of stock for property taken at an overvaluation. If the property which is turned in is practically worthless, or is unsubstantial and shadowy in its nature, the courts will hold that there has been no payment at all, and that the stockholders are liable on the stock.³

¹ *Handley v. Stutz*, 139 U. S. 417 (1891). The liability of stockholders cannot be enforced for the benefit of creditors who dealt with the corporation knowing that the stock had been issued for property taken at an overvaluation. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (1897). See also cases cited in § 42, *supra*.

² *Bank of Fort Madison v. Alden*, 129 U. S. 372 (1889). A stockholder paying his stock subscription in property at an agreed value is not liable in equity to a creditor of the corporation, who had knowledge of and assented to the transaction at the time when it took place, upon the ground that the real value turned out to be less than was agreed upon. *Rickerson, etc. Co. v. Farrell, etc. Co.*, 75 Fed. Rep. 554 (1896).

A corporate creditor who took the note of the corporation in payment of an antecedent debt, and took with full knowledge of the facts as to the issue of the stock for property, cannot complain. A corporate creditor cannot complain as to stock issued subsequently to the debt. *First Nat. Bank v. Gustin, etc. Co.*, 42 Minn. 327 (1890); *contra*, 50 N. E. Rep. 19.

An issue of stock for an old franchise and uncompleted road-bed of a railroad is valid although the par value of the stock is much more than the value of the property. All the

stockholders having assented thereto, and there being no creditors, the transaction is valid. A holder of bonds issued long subsequently, and who purchased with knowledge of the facts, cannot complain and hold the stockholders liable. *Walburn v. Chenault*, 43 Kan. 352 (1890). See *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

A stockholder who is also a creditor, and who became such with full knowledge that the stock was paid for by property at an overvaluation, cannot, as a creditor, compel other stockholders to make payments on their stock as being partly unpaid. *Whitehill v. Jacobs*, 75 Wis. 474 (1890). Under the Tennessee statutes, creditors prior to an issue of stock for property at an overvaluation may complain as well as those after. *Jones v. Whitworth*, 94 Tenn. 602 (1895). See also § 42, *supra*.

³ The supreme court of the United States, in *Camden v. Stuart*, 144 U. S. 104 (1892), held liable for unpaid subscriptions the subscribers to \$150,000 of stock who had turned in therefor a contract for real estate and a health resort which a year prior thereto they had taken. The court did not allow any value for the contract and threw out the good-will, and said (p. 115): "The experience and good-will of the partners, which it is

The remedy of the corporate creditor is in equity.¹ An action at law for fraud or for conspiracy is difficult to maintain.² Liability on stock issued for property at an overvaluation commences only upon insolvency of the corporation. Hence the

claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. It is not denied that the goodwill of a business may be the subject of barter and sale as between the parties to it, but in a case of this kind there is no proper basis for ascertaining its value, and the claim is evidently an afterthought. The same remark may be made with regard to the contract of January 30th, and the loss of time and trouble to which the parties were subjected, which are now claimed to be elements of value in the property contributed to the corporation, but of which no account was made at the time."

In the case of *Lloyd v. Preston*, 146 U. S. 630 (1892), affirming *Preston v.*

Cincinnati, etc. R'y, 36 Fed. Rep. 54 (1888), where the owner of a railroad sold it to a newly-organized corporation for stock and bonds, the par value of which was fifty times the real value of the railroad, the court held that the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned unsatisfied, might hold the party receiving the stock liable thereon on the ground that the subscription price of such stock has never been paid. The court (p. 642) said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature. It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended

¹ The corporate creditor's remedy herein is not by an action at law for fraud and deceit. *Priest v. White*, 89 Mo. 609 (1886).

In a suit to enforce the liability of the stockholders on stock issued for property at an overvaluation, it is not necessary to make all of the stockholders defendants, but any defendant to the creditor's bill may file a cross-bill and bring in the stockholders who are not parties. *Coleman v. Howe*, 154 Ill. 458 (1895).

A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account; and to hold stockholders liable on stock issued for property; and to reach corporate assets in third parties' hands, is multifarious. *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205 (1895).

Where the assignee of an insolvent corporation, in attacking the pay-

ment for stock by property, sues the stockholders as though no payment at all had been made, he cannot prove overvaluation of property turned in in payment. His pleading is wrong. *Smith v. Prior*, 58 Minn. 247 (1894).

The corporate creditor's bill may be by one, but must be in behalf of all. *Cleveland Rolling-Mill Co. v. Texas*, etc. R'y, 27 Fed. Rep. 250 (1886).

In a creditor's suit to enforce subscriptions for stock it is not sufficient to put in evidence a contract showing that the stock had been issued for work and services to be performed. Proof must be given of the performance. *Clow v. Brown*, 134 Ind. 287 (1893).

² It is difficult for a corporate creditor to seek collection by making out a conspiracy. *Brackett v. Griswold*, 13 N. Y. Supp. 192 (1891).

statute of limitations runs from that date.¹ Laches may be a bar to the collection of what is claimed to be due on watered stock.²

§ 47. *Liability of such persons under various constitutional provisions in Pennsylvania, Illinois, California, Kentucky, Nebraska, Alabama, Arkansas, Missouri, Texas, Louisiana, Colorado, and other states, and under statutory provisions in New York, Maine, Ohio, Wisconsin, Minnesota, Tennessee, Indiana, New Jersey, Washington and Iowa.*—The preceding section contains the common law on the liability of persons

payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up.”

In *Re Theatrical Trust, etc.*, 72 L. T. Rep. 461 (1895), the court in a *dictum* laid down the rule in regard to payment for stock by property as follows: “The conclusion I come to is this: that if the consideration is illusory, or if it presents an obvious money measure which shows that the shares were issued at a discount, or if the shares are openly issued at a discount, in all these cases” the party receiving the stock is liable. “He may give goods, he may give things that have no physical existence, such as a good-will or a license,—in fact, all sorts of things, in consideration of shares allotted to him, and thus pay for the shares. These two cases decide that an allottee must really pay for the shares. They go further than that, and decide that if the contract makes it manifest on the face of it that an allottee is paying less than the nominal cash value of the shares, he may be liable for the balance beyond what he has paid. I do not think, however, that those cases go beyond that. I do not understand them to decide

that the court has any duty or power to take each contract and consider whether the price which is agreed to be given is a fair and reasonable price, or whether the thing which is to be taken in payment instead of cash is in the market of a cash value equal the nominal value of the shares.”

Where, upon the increase of the capital stock, \$3,000 of stock is issued to a party for a patent-right, and in about six months the patent-right is assigned back to him for \$1, he will be held liable for the \$3,000 in case the corporation becomes insolvent. *Peck v. Elliott*, 79 Fed. Rep. 10 (1897). Where \$2,500 of stock are issued for \$5,000 cash and services as an officer and manager, the court will allow the fair value of his services and hold him liable for the difference in aid of corporate creditors. *Addison v. Pacific, etc. Co.*, 79 Fed. Rep. 459 (1897).

¹ *Jones v. Whitworth*, 94 Tenn. 602 (1895). The time may be shorter as to deceased stockholders. *Id.*

² Thus, where stock is issued for services and its actual value is worth much less than the services, and seven years elapse, a creditor cannot complain, especially when he bought up a claim. *Wilson v. St. Louis, etc. R. R.*, 120 Mo. 45 (1894). Fourteen years' delay is fatal as to the corporation. *San Antonio St. R'y v. Adams*, 25 S. W. Rep. 639 (Tex., 1894).

who pay for stock in property taken at an overvaluation. The common law sustains the transaction and hence renders easy the issue of watered stock. Now in former days watered stock did much harm. It deceived people and induced them to buy the stock or bonds, or to extend credit to the company, on the supposition that the capital stock had really been paid for at actual par value. Hence, when it became clear that the common law did not prevent the issue of watered stock, but compelled the public to rely, not upon statements of the capital stock, but on an investigation of the actual condition of the company, a demand arose for statutes and constitutional provisions to protect the people from watered stock.

This demand gave rise to certain constitutional provisions which have been enacted in several states. These provisions are very similar in their wording, and are substantially as follows: "No corporation shall issue stocks or bonds except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."¹

It is now over twenty years since the first of these provisions was enacted, and yet it may be said that these constitutional provisions have decidedly failed to remedy the evil which they were expected to cure. They are so sweeping in their effects, and so disastrous to innocent holders of corporate securities, that the courts are reluctant to declare void the stock and bonds which have passed into *bona fide* hands. The provision is held to be applicable and effective only when the issue is entirely fictitious. It does not interfere with the customary methods of starting the corporate enterprise by the issue of stock and bonds in payment for the construction of the corporate works, and, except in Alabama and Missouri, it may be said that the courts have construed away the language and purpose of the provision.²

¹ See the constitutions of Alabama, § 138; Pennsylvania, art. XVI, § 7; art. XIV, § 6; Arkansas, art. XII, § 8; South Dakota, art. XVII, § 8; Texas, California, art. XII, § 11; Colorado, art. XII, § 6; Washington, art. XII, § 6; art. XV, § 9; Idaho, art. VIII, § 9; ² *Federal courts*: The supreme court of the United States, in *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887), held that this provision did not invalidate a transaction upon the reorganization of a company after a

The supreme court of Alabama and the supreme court of Missouri take issue with the above statement of law and assert that these constitutional prohibitions have been effective. In reply to this the author refers to the decisions of the supreme

foreclosure of its property, and a purchase of the property by a committee for the bondholders, whereby they took in payment of such property the bonds and stock of the new corporation, even though the stock alone of the new company thus taken was, at its par value, equal to the value of the property involved.

Where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. "If when disposed of by the railroad company it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. *Fogg v. Blair*, 139 U. S. 118 (1891).

The Illinois constitutional provision does not render invalid the issue of \$9,000,000 of bonds and \$18,000,000 of stock for property purchased at foreclosure sale for \$1,500,000, there having been added to the property \$6,000,000 worth of improvements. The court pointed out that the issue of the stock did not interfere with creditors collecting their claims, inasmuch as their claims were ahead of the stock, and the bonds by themselves were not in excess of the property itself. *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897).

The California constitutional prohibition against the issue of fictitious bonds or stock does not prevent the company pledging its bonds for a

debt less than the par value of such bonds. *Atlantic, etc. Co. v. Woodbridge, etc. Co.*, 79 Fed. Rep. 842 (1897).

It is legal for a company to issue \$67,000 of bonds and \$67,000 of full-paid stock even to one of its directors for \$67,000 in cash, if this was all that the whole \$134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to it. The provision in the California constitution relative to watered stock and bonds does not invalidate them. *Union L. & T. Co. v. Southern California, etc. Co.*, 51 Fed. Rep. 840 (1892).

Although watered stock and bonds are issued in Pennsylvania, yet a *bona fide* purchaser of the bonds may foreclose the mortgage securing them in order to obtain payment. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895).

In *New Castle, etc. R'y v. Simpson*, 21 Fed. Rep. 533 (1884), the court, in passing on the provision in the Pennsylvania constitution, held that a contract giving a construction company \$300,000 of stock and \$300,000 of bonds for work worth but \$180,000 would be set aside, although \$40,000 of work had been done; but that the construction company should be repaid the \$40,000 in cash. See *S. C.*, 23 Fed. Rep. 214 (1885), holding that the contractor may recover back not only this, but also a reasonable compensation and interest.

Where \$100,000 of bonds and \$125,000 of stock are issued in payment of construction work of the value of \$121,000, the bonds are valid and may be enforced by *bona fide* purchasers. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). This last case held also that only the state could ob-

court of the United States and of the supreme courts of various states set forth in the notes below. The trouble with these constitutional prohibitions is that they attempt to cure the evil after the harm has been done, instead of attempting to over-

ject to an issue of "watered" stock and bonds as being in violation of this constitutional provision.

Where stock is issued as full paid for labor done, and the good faith is not questioned and the consideration was performed, the stockholders cannot be held liable on the stock as not being paid up in full. *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879 (1891).

In the case of *Northwestern, etc. Ins. Co. v. Cotton, etc. Co.*, 46 Fed. Rep. 22 (1891), the court held that where property worth \$157,000 is turned in to a corporation for \$200,000, payable in \$125,000 of stock and \$75,000 of bonds, the creditors of the company might hold the parties liable on the stock, as though it were unpaid stock, and the creditor is presumed not to have known of the transaction when he contracted the debt.

The constitutional provision in Alabama forbidding the issue of stock or bonds except for value, and the statutory provision requiring subscriptions to railroad stock to be paid in money, labor or property at their money value, does not prevent one railroad company selling its property to another railroad company for bonds and stock of the latter, and the value placed upon the property may be its net earning power and the cost of rebuilding it. It is immaterial that the original cost was much less. *Grant v. East, etc. R. R.*, 54 Fed. Rep. 569 (1893).

In the case of *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892), the court held that the above provision in Alabama against watered stock and bonds did not invalidate bonds, although \$10,000 of bonds and \$10,000 of stock were

issued for every mile of road constructed, even though it cost much less than \$20,000 cash per mile.

The Texas prohibition is not applicable to a contract of a land improvement company to issue bonds to aid in building a bridge. *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294 (1894).

Under the Texas statute, providing for bringing in the stockholder and holding him liable on his unpaid subscription in the same action in which the corporation itself is sued, the stockholder will not be held liable although he sold the company \$55,000 worth of property for \$32,500 in cash and \$45,000 in stocks and bonds. *Thomson-Houston, etc. Co. v. Dallas, etc. Co.*, 54 Fed. Rep. 1001 (1893).

Under the peculiar wording of the Kentucky constitution, to the effect that property or labor shall not be received in payment of stock or bonds "at a greater value than the market price at the time the said labor was done or property delivered," a contract, by which the assets of one corporation are to be turned over to a new corporation, so that the stockholders of the old corporation shall receive preferred stock in the new corporation dollar for dollar for their old stock, and that then \$235,000 of common stock is to be given to brokers who agree to sell \$100,000 of bonds at ninety cents on the dollar, is illegal, and an action by the brokers for damages for breach of such contract will not lie. *Altenberg v. Grant*, 85 Fed. Rep. 345 (1898).

Illinois: The supreme court of Illinois settled this question for that state properly when it rendered the decision in *Peoria, etc. R. R. v.*

see the issue of stock and bonds before the issue is made. There is but one state in the Union which has succeeded in eliminating most of the evils of stock-watering. That state is the commonwealth of Massachusetts. The remedy there is

Thompson, 103 Ill. 187 (1882). In this case bonds and cash were given to the contractors in payment for the construction of the road. The transaction was upheld.

This decision was practically the first important decision in the country on this constitutional provision now so common, and the supreme court of Illinois wisely held that the provision was not intended to interfere with the usual business method of issuing the stock and bonds of corporations.

In *Coleman v. Howe*, 154 Ill. 458 (1895), the court held that, where property of known value and worth but \$75,000 is sold to a corporation for \$150,000 capital stock and a mortgage for \$70,000, fraud is presumed, and the stockholders are liable for the par value of the stock less the \$5,000. The court said: "Some of the cases hold that overvaluation will not render the stockholder liable for the difference between the actual and accepted values unless there is an affirmative proof of fraud *aliunde*. But other cases hold what we regard as the better view, namely, that where property whose value is well known, or can be easily learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law."

The fact that a contractor received

stock and bonds four times in par value the value of the work is not fatal, where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate in the property purchased at the sale, all for the purpose of cutting off other creditors, he is liable to them. *Cleveland, etc. Co. v. Crawford*, 9 R'y & Corp. L. J. 171 (Chicago, 1891).

Where the stockholders in an insolvent California corporation formed an Illinois corporation and exchanged their stock for stock in the latter, in order to avoid the California statutory liability, and then transferred the property of the California corporation to the Illinois corporation, the Illinois court held them liable on the new stock to the extent that the actual value of the property was less than the par value of the stock. *Sprague v. Nat. Bank of America*, 50 N. E. Rep. 19 (Ill., 1898).

Pennsylvania: Where a water-works company issues all its stock and bonds to a contractor for construction work in advance of the work, and the contractor pledges them to a banker for advances, the other creditors of the water-works company cannot claim an interest in such securities even though the banker had assumed the contractor's obligation to one other creditor. *McNeal, etc. Co. v. Bullock*, 174 Pa. St. 93 (1896).

It is legal for a corporation to issue stock as full paid to a person in consideration of his leaving an employment in which he is engaged and of assuming the presidency of the cor-

a prohibition against the issue of any stock or bonds for property until after state commissioners have passed upon the proposed issue. That state does not wait until the stock and bonds have been issued and either sold or used as collateral security.

poration. *Shannon v. Stevenson*, 173 Pa. St. 419 (1896).

In the important case, *American Tube, etc. Co. v. Hays*, 165 Pa. St. 489 (1895), the members of a firm engaged in operating gas wells formed a corporation with a capital stock of \$500,000. They agreed with the corporation to transfer the firm's property to it in payment of the \$500,000 of stock, and also that they should retain only \$175,000 of such stock, and turn into the company's treasury the remainder as a working capital. The contracts were performed in good faith. The court held that the stock was paid up, and that the subscribers were not liable to creditors for the amounts subscribed by them.

It was also held that the fact that the property transferred to the company afterwards proved to be much less in value than \$175,000 did not render the stockholders liable, there being no proof of fraud or bad faith, and the value of the property at the time of the transaction having been largely speculative, it being natural-gas property.

Where stock is actually issued for property, it is useless to check money in and out in payment. "Not a dollar in actual money was used in the transaction, and what end was accomplished by all this idle ceremony it is impossible for us to see. But, if it did no good, we cannot see, in the absence of any finding of fraud intended or practiced, that it did any serious harm." *American Tube, etc. Co. v. Hays*, 165 Pa. St. 489 (1895).

A land-owner who agrees to take pay from a railroad for a right of way in shares of stock must take the stock at its par value and not at its

market value. *Hoffman v. Bloomsburg, etc. R. R.*, 157 Pa. St. 174 (1893).

Where the president of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issue stock and bonds in payment without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land. *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa., 1898).

Land may be turned in in payment for stock, even at an overvaluation, where the valuation is set forth in the incorporation papers, under the Pennsylvania act. *Cock v. Bailey*, 146 Pa. St. 328 (1892).

A contractor who receives bonds in payment of construction work and sells them cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. *Reed's Appeal*, 122 Pa. St. 565 (1888).

Where a consolidated company of New York and Pennsylvania issues bonds in New York fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void. *Pittsburgh, etc. R. R. v. Rothschild*, 4 Cent. Rep. 107 (1886).

In passing upon the legality of an issue of \$500,000 of stock for a road that had just been sold under a mortgage for \$100,000, the court said in *Commonwealth v. Central Passenger R'y*, 52 Pa. St. 506, 515 (1886): "In all such cases the determination of the amount of stock must be an arbitrary adjustment. As we have said, the

The remedy is applied in the origin of the transaction, and has been found to be effective as well as just. There are few Massachusetts cases in this chapter — a proof of the justice and efficacy of the Massachusetts remedy. On the other hand, the

cost of the property is no fair measure of what the stock represents, and if the real value be adopted as the standard, it is no standard at all. It varies with the estimates of witnesses, and the franchises are incapable of valuation. . . . If that was a sum greater than the actual value of the company's franchises and property, as it was greater than the cost, we are unable to see how the public was affected by the exaggerated estimate."

As to the common law of Pennsylvania on this subject, see § 46, *supra*.

California: In California the supreme court, in *Stein v. Howard*, 65 Cal. 616 (1884), has held that the constitutional prohibition does not prevent the issue of stock at less than its par value. The meaning of "fictitious" is defined to be that given in Webster's Dictionary. The court said: "Of the stock proposed to be issued *there is no one share* upon which a person can place his finger and say that share is or will be feigned, imaginary, not real; counterfeit, false, not genuine." An injunction to restrain such an issue of new increased stock was refused.

Receiving the subscriber's note in payment for stock does not render the stock void, under this constitutional provision. *Pacific Trust Co. v. Dorsey*, 13 Pac. Rep. 148 (Cal., 1887), affirming S. C., 72 Cal. 55 (1886).

Where a corporation that *has no property* issues \$2,475,000 of full-paid stock as the purchase price of property worth \$1,200,000, and also assumes mortgage bonds on such property to the amount of \$1,050,000, such stock is not fictitious, and a stockholder in the purchasing corporation cannot complain, inasmuch as he is not in-

jured. *Smith v. Ferries, etc.* R'y, 51 Pac. Rep. 710 (Cal., 1897).

Where stock is issued for property, but at an agreed price of fifty cents on the dollar for the stock, the certificates of stock not purporting to be full paid, the party is liable to corporate creditors for the other fifty cents on the dollar. *Stockton, etc. Co. v. Houser*, 109 Cal. 1 (1895).

Under the California constitution, a note conditioned upon the completion of the road in a given time and given to the corporation for stock is void. *Jefferson v. Hewitt*, 103 Cal. 624 (1894).

Colorado: Stock issued as full-paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holder of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. *Arkansas River, etc. Co. v. Farmers' L. & T. Co.*, 13 Colo. 587 (1889). See 53 Pac. Rep. 959.

Nebraska: In the case of *Troup v. Horbach*, 74 N. W. Rep. 326 (Neb., 1898), the supreme court reversed the court below and held that although \$20,000 par value of stock was issued for real estate worth only \$6,000, yet that neither the party receiving the stock nor his transferees with notice were liable for the remaining \$14,000, no fraud or misrepresentation being shown.

The issue of stock in violation of this provision of the constitution renders the charter liable to forfeiture by the state. *State v. Atchison, etc. R. R.*, 24 Neb. 143 (1888).

In *Gilkie, etc. Co. v. Dawson, etc. Co.*, 46 Neb. 333 (1895), where \$240,000

flood of litigation in the courts of Alabama, Missouri and the other states, on this subject, is similar proof of the injustice and failure of the policy of repudiation. Moreover, the bewildering currents of conflicting decisions, even in those states where the most earnest efforts are made to enforce the constitutional provisions, leave the investor on an unknown sea, without chart, compass, landmark or pilot.¹ Even in Alabama and Missouri

par value of stock was issued for an equity in land, such equity being worth only \$20,000, the court held that the transaction was fraudulent *per se*, and the holders of the stock were liable for the difference between its par value and the \$20,000, and the court also held that the transferees, taking with full knowledge of the facts, were also liable.

Kentucky: Where a person buys land for \$5,000 and pays down one-half thereof, then through friends sells it to a corporation formed for that purpose for \$10,000 of stock, the corporation assuming the other two-thirds of the original purchase price, the transaction is legal if the land is worth \$10,000, and the stockholders are not liable on the stock even though they received their stock from the vendor for nothing, and even though the land finally sold on foreclosure sale for \$3,000 and the original vendor brought suit as a creditor of the corporation. *Mercer v. Park, etc. Co.*, 38 S. W. Rep. 841 (Ky., 1897).

Washington: In *Manhattan Trust Co. v. Seattle, etc. Co.*, 16 Wash. 499 (1897), a person bought coal mines for \$70,000, and then organized a corporation and sold them to the corporation for \$5,000,000 full-paid stock and \$320,000 mortgage bonds. The company did not pay the interest on the bonds and incurred a floating debt of \$135,000. The bonds were still held by the original parties, and the trustee of the mortgage took possession under the mortgage and filed a bill in equity to protect the possession and to obtain a receiver. The

court held that the transaction was fraudulent, but subsequently, in the same case, the court practically overruled this decision and held that the bonds were legal. 53 Pac. Rep. 951 (1898).

Where stock is issued to an attorney and on its face is marked "Paid up," it may nevertheless be a question for the jury whether it was paid for by agreement by services. *Elderkin v. Peterson*, 8 Wash. 674 (1894).

A creditor cannot object where the stock was issued for property honestly believed to be worth the par value of the stock. *Turner v. Bailey*, 12 Wash. 634 (1895).

Even though real estate worth but \$2,000 is deeded to a corporation in payment for \$4,000 of stock, yet the holder of the stock is not liable for the remaining \$2,000, under the statutes of Washington, the court saying that no actual intention of fraud was proved, and that no proof was given that the corporation was formed to issue paper or obligations to third parties, or to incur any indebtedness at all, and that mere overvaluation did not constitute fraud. *Kroenert v. Johnston*, 52 Pac. Rep. 605 (Wash., 1898), limiting prior decisions.

Texas: If the contract does not expressly state that the stock is to be paid-up stock in consideration of the property received, the court will not presume that such was the contract. *Keating v. McCutcheon*, 36 S. W. Rep. 597 (Tex., 1896). See 44 id. 906, 1012.

¹ *Alabama*: A promoter who takes part in selling property to the corpo-

the courts feel obliged to construe this constitutional provision in such a way as to protect the equities of innocent parties.

In fact, in Alabama the supreme court has lately intimated that it will go no further in creating, by reason of this consti-

ration for stock, the par value of which is five times the amount paid by the promoters for the property, and who afterwards becomes a director and then sells his stock and becomes a creditor of the corporation, cannot hold the stockholders liable for the difference between its par value and the value of the property. *Nicrosi v. Calera L. Co.*, 22 S. Rep. 147 (Ala., 1897).

Although \$50,000 of stock, issued as full paid, and \$25,000 of mortgage bonds are issued for \$2,500 worth of property, yet the parties receiving the same are not liable to corporate creditors for the value of the bonds, the bonds still being in the possession of the parties receiving the same. The parties receiving the stock, however, are liable to corporate creditors on the stock as being unpaid. *Roman v. Dimmick*, 22 S. Rep. 109 (Ala., 1897).

A promissory note given to a corporation to pay for stock issued at fifty cents on the dollar cannot be enforced, and even a renewal note in such a transaction cannot be enforced. *Alabama Nat. Bank v. Halsey*, 109 Ala. 196 (1895).

If the tangible property of the corporation is actually in excess of the par value of the capital stock, then a stock dividend to the extent of that excess would be legal, but the proceedings to declare the stock dividend must show these facts or the dividend will be enjoined. *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604 (1887). The court very judiciously changed the reasoning of its opinion as reported in 2 S. Rep. 727.

A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Ala-

bama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. *Williams v. Evans*, 87 Ala. 725 (1889). See also concerning the rule in Alabama, *Knox v. Childersburg Land Co.*, 86 Ala. 180 (1889).

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par directly from the corporation to the person taking the bonus. The value of the property in this case was not proved. *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890).

Where parties pay \$5,000 on a \$53,000 contract to buy land, and then organize a corporation and turn this contract into the corporation for \$250,000 of stock issued as full paid, the company agreeing to pay the other \$50,000, they are liable to corporate creditors for the difference between \$250,000 and the value of the property. The constitution and statute of Alabama forbid such a transaction. *Elyton Land Co. v. Birmingham, etc. Co.*, 92 Ala. 407 (1891). See also 23 S. Rep. 703 (1898).

A contract calling for "original, ground floor, or treasury stock" means any of the stock that is issued, where the statutes prohibit fictitious stock. All the stock is then presumed to be "ground floor" stock and to represent at par the actual value received. *Williams v. Searcy*, 94 Ala. 360 (1891).

In regard to the constitutional provision against the issue of fictitious bonds and stock, the supreme court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of

tutional provision, a liability which none of the parties contemplated at the time of the transaction.¹

Statutes are found in some of the states on this subject. There have been a large number of decisions under these various stat-

money, or the value of the labor or property, for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued." Hence the court held that bonds might be issued at less than their par value, provided that some substantial value was paid for them, such value to be fair and reasonable, and "not a mere trick or device to evade the law." *Nelson v. Hubbard*, 96 Ala. 238 (1892).

A contract for the sale of stock is valid, although the stock is watered stock issued at one-half its par value, in violation of the statute. *Beitman v. Steiner*, 98 Ala. 241 (1893). See also cases in next note.

Missouri: Where \$100,000 of the stock of an Illinois corporation is issued to parties who agree to turn in a patent therefor, and the patent is never turned in, and in fact turns out to be of no value, the parties receiving the stock with notice are liable thereon to *bona fide* corporate creditors, even though such stock recites on its face that it is fully paid. *Van Cleve v. Berkey*, 44 S. W. Rep. 743 (Mo., 1898). In this case the court claimed that the constitutional prohibition against watered stock in that state had proved to be effective, and the court reviewed the Missouri decisions on this subject. The court declared that certain statements in the opinion in *Woolfolk v. January*, 131 Mo. 620 (1895), were *obiter dicta*. The latter case disapproved of *Shickle v. Watts*, 94 Mo. 410, and upheld an issue of \$60,000 of stock and \$20,000 of bonds for a gas plant and franchise that cost about \$35,000.

Parties who have an option to purchase certain coal lands cannot le-

gally, under the Missouri constitution, sell that option to a corporation for \$1,000,000 full-paid stock of the corporation, the corporation agreeing, in addition thereto, to pay, by means of bonds, the full actual cost of the land, the option for which the promoters have turned over to the corporation. On a bill filed by the corporation to ascertain who was entitled to the stock, the court held that it would not order the issue of the stock at all, the contract being still executory. *Garrett v. Kansas City, etc. Co.*, 113 Mo. 330 (1892).

In Missouri a contractor who was paid in bonds and stock was held liable to corporate creditors for the par value of the stock over and above the market price of all the bonds and stock so given, where such value was greater than a reasonable price for the contract work. The court said "that where an agreement is entered into between a contractor and a corporation, whereby the former is to perform work for, or furnish material to, the latter, and to take unpaid stock in part or in full payment, that such contractor, whether for labor or material, can only charge therefor the reasonable market value for such labor or material thus given in exchange; and that all agreements by the corporation to pay more than such reasonable compensation will be disregarded and held for naught by the courts, when the rights of creditors intervene; and this is the case even though no fraud be proven." *Shickle v. Watts*, 94 Mo. 410 (1888).

¹In *State v. Webb*, 110 Ala. 214 (1896), the supreme court of Alabama stated with great clearness the difficulties of applying the above-men-

utes, and those decisions have been confused with the cases which were decided on the common law alone. The following are some of these statutes:

In New York directors in manufacturing corporations were formerly made personally liable for all corporate debts, if, in the reports which they were required to file, they misstated facts. Accordingly, if they stated the capital stock to have been paid up, when in fact it was paid for by property taken at a fraudulent overvaluation, then the penalty applied. Most of the New York cases on watered stock arose under this statute. Under this statute the court of appeals was at first in doubt whether proof of a mere overvaluation of the property was sufficient to set aside the payment as a full payment, or whether it was necessary for the plaintiff to prove also that the overvaluation was intentional and fraudulent.¹ Later cases, however, firmly established the principle that not only must proof be given that there was an overvaluation of the property or services rendered, but proof also must be given that such overvaluation was intentional and consequently fraudulent.²

Moreover, the property was not to be considered as overvalued merely because, subsequently, it turned out to be so. The various circumstances under which the valuation was made were considered in determining the *bona fides* of the transaction.³ The questions as to whether there was an overvaluation of the property, and whether that overvaluation was intentional and fraudulent, were generally questions of fact to be submitted to the jury.⁴

tioned constitutional provision, and the court stated many questions which remain to be adjudicated, which the court stated must be carefully considered when they arise.

In *Nicrosi v. Irvine*, 102 Ala. 648 (1894), where land was turned in for stock at five times its value and cost, a corporate creditor garnished a stockholder as being liable on his stock so issued. The process failed, the court holding that the creditor's remedy was in equity alone. The court also disapproved of some of the *dicta* contained in *Parsons v. Joseph*, 92 Ala. 403, and *Joseph v. Davis*, 10 S. Rep. 830 (Ala., 1892).

¹ *Boynton v. Hatch*, 47 N. Y. 225 (1872). Three of the judges held that proof of fraud was necessary, and three that it was not necessary. All concurred in holding that proof of overvaluation was competent and necessary.

² *Douglass v. Ireland*, 73 N. Y. 100 (1878); *Schenck v. Andrews*, 57 N. Y. 133 (1874); *Boynton v. Andrews*, 63 N. Y. 93 (1875); *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882).

³ *Schenck v. Andrews*, 57 N. Y. 133 (1874); *Coit v. North Carolina, etc. Co.*, 14 Fed. Rep. 12 (1882); affirmed, *Coit v. Gold Amal. Co.*, 119 U. S. 343 (1886).

⁴ *Boynton v. Hatch*, 47 N. Y. 225

Where, however, the overvaluation was so great as to bear evidence upon its face that it was intentional and fraudulent, the court held that, unless the transaction was reasonably explained, there was no question of fact for the jury, but that, as a matter of law, the overvaluation was fraudulent. Various cases which arose under this statute are given in the notes below.¹

(1872); *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882).

¹ Thus, where stock for \$300,000 was issued for property which the jury found to be worth \$64,000, the court held, as a presumption of law, that the transaction was fraudulent. *Douglas v. Ireland*, 73 N. Y. 100 (1878). In another case, involving the same facts, the trial court submitted the question to the jury. *Brockway v. Ireland*, 61 How. Pr. 372 (1880).

In another case, where stock for \$100,000 was issued for property worth not more than \$50,000, the court held that, in the absence of evidence to explain the presumption of fraud, there was no question for the jury, and that the transaction was fraudulent upon its face. *Boynton v. Andrews*, 63 N. Y. 93 (1875). An issue of \$190,000 of stock for property worth \$27,500 was held to be a fraudulent overvaluation, as a matter of law. *Osgood v. King*, 42 Iowa, 478 (1876). The case of *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882), tends to make the valuation of the property a question for the jury exclusively. In that case stock for \$2,500,000 was issued for property in a patent; \$900,000 of the stock was returned to the corporation as a gift. The court held that the question of fraud was for the jury. This case was followed in *Draper v. Beadle*, 16 Weekly Dig. 475 (1883). In *Bolz v. Ridder*, 19 Weekly Dig. 463 (1884), N. Y. Com. Pl., the remarkable rise in value of a patent-right from \$1,000 to \$100,000, when sold for stock issued in payment there-

for, was held to be only presumptively fraudulent, and may be explained sufficiently to raise a question for the jury. The directors in estimating the value of property may take the opinion of experts and rely thereon. *Brockway v. Ireland*, 61 How. Pr. 372 (1880). See also *Knowles v. Duffy*, 40 Hun, 485 (1886); *Van Vleet v. Jones*, 75 Hun, 340 (1894). Cf. *Thurston v. Duffy*, 38 Hun, 327 (1885).

Under the New York statute, where patents worth \$75,000 are transferred to the corporation in payment for \$300,000 of stock, and \$100,000 of the stock is at once donated to the company by the inventor, and other stock is at once sold by him for about one-third of the par value, the only fraudulent intent that need be proved is that the directors knew that the patents were not worth \$300,000. *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302 (1891).

In determining whether property is worth the par value of stock which is issued for it, the intrinsic or market value is the test, but the jury may consider also "its value for the use to which it was to be put, and the adaptability of it to any specific purpose, and any peculiar advantages" it then had. *Huntington v. Attrill*, 118 N. Y. 365 (1890). The evidence of experts as to the value of similar property is not admissible. *Huntington v. Attrill*, 118 N. Y. 365 (1890).

Under the New York statute, where property worth but \$60,000 is turned in for \$1,000,000 of stock and \$200,000 of bonds, the act is fraudulent. *Blake*

Under the New York statute prior to 1892, stockholders also were liable in certain companies to double the amount of their stock unless a certificate was filed to the effect that the capital

v. Griswold, 103 N. Y. 429 (1886), sustaining a finding of the special term to that effect. See also *Hatch v. Attrill*, 118 N. Y. 383 (1890).

In the case *Chittenden v. Thannhauser*, 47 Fed. Rep. 410 (1891), the court held the directors liable under the statute for a false report where \$1,500,000 of stock was issued for mines and property which was offered for sale at about the same time for \$150,000. See also 155 N. Y. 475.

In *Ferguson v. Gill*, 64 Hun, 284 (1892), \$100,000 of stock was issued for a patent which turned out to be worthless. The statute made the directors liable if they knew this fact. The court held that the officers were entitled to prove the conversation at which the value was fixed upon.

In *Thurber v. Thompson*, 21 Hun, 472 (1880), the court said the jury should have before them "evidence of the probable enhanced value growing out of the contemplated improvements made and to be made by the company, and of the public improvements which were expected to add largely to the value of the land for the new objects and purposes to which it was to be devoted. It would be extremely unjust to such a company as this to hold that farming lands upon which the site of a city or town is about to be established, and which are bought for that purpose, and mapped, plotted, and subdivided into city or village lots, are to be viewed, upon a question of overvaluation, merely as agricultural lands."

See also *Huntington v. Attrill*, 42 Hun, 459 (1886), *aff'd*, 118 N. Y. 365, where land costing \$80,000 was turned in for \$700,000 of stock. The finding of the jury that the act was fraudulent was sustained on appeal.

In New York, under the statute allowing the incorporation of manufacturing companies, it has been assumed that an issue of stock as paid up for cash, at less than its par value, is void. *Spring Co. v. Knowlton*, 103 U. S. 49 (1880); *Knowlton v. Congress, etc. Co.*, 14 Blatchf. 364 (1877); S. C., 14 Fed. Cas. 797; *Knowlton v. Congress, etc. Co.*, 57 N. Y. 518 (1874). These three decisions arise from the litigation of a single case. After being reversed in the New York court, it was removed into the federal court. In all three decisions the invalidity of the stock was conceded by both parties. The federal courts differed from the state courts, and held that a person partly paying for such illegal stock may recover back such payment, although he had allowed the stock to be forfeited for non-payment of further calls.

Under the New York Manufacturing Company Act, providing for the issue of stock for property "to the amount of the value thereof," the value of the property must equal the par value of the stock. *Gamble v. Queen's, etc. Co.*, 123 N. Y. 91 (1890), the court referring to and approving *Van Cott v. Van Brunt*, 82 N. Y. 535 (1880), as being a decision sustaining the common-law right to issue stock below par.

In estimating the value of property turned in to a corporation in payment of stock, a fair profit to the contractor is to be allowed. *Gamble v. Queen's, etc. Co.*, 123 N. Y. 91 (1890). Even though a corporation accepts a note instead of cash in payment for a subscription in violation of the statute which provides that only money, labor done, or property actually received shall be accepted in payment for stocks and bonds, yet a

stock was all paid in.¹ The statute now provides for liability until the stock *actually issued* has been paid up.²

In Ohio, by statute, an issue of stock to a director, directly or indirectly, for less than the par value thereof, is void,³ and the general statutes of the state are construed as invalidating an issue of stock for property taken at an overvaluation.⁴ So

bank which discounted such note for a corporation may hold the corporation liable thereon. *First Nat. Bank v. Cornell*, 8 N. Y. App. Div. 427 (1896). The common law on this subject as laid down by the New York courts is given in § 46, *supra*.

¹ It has been held that an issue of \$300,000 of full-paid stock for a right to apply for patents, which the jury find are worth but \$75,000, subjects a stockholder to this statutory liability in New York to an amount equal to the par value of the stock, even though the creditor knew all the facts when he gave credit. *National Tube Works Co. v. Gilfillan*, 46 Hun. 248 (1887); *aff'd*, 124 N. Y. 302 (1891).

Under the statute creating a double liability until the stock is fully paid, a creditor may show that property was taken at an overvaluation knowingly and fraudulently, and may then enforce the liability. *Goodrich v. Dorman*, 14 N. Y. Supp. 879 (1891).

Under the former New York statute making stockholders liable, the creditor was bound to prove that the directors overvalued the property deliberately and with knowledge of the real value of the property. *White, etc. Co. v. Jones*, 86 Hun. 57 (1895).

In *Powell v. Murray*, 3 N. Y. App. Div. 273 (1896), where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon under the

New York statute as not being paid-up stock, such contract being *ultra vires*.

In *Herbert v. Uhl*, 20 N. Y. Supp. 743 (1892), the court seemed to hold that at common law the question of whether services rendered in consideration of stock were fairly worth the amount of stock so issued for such services should be submitted to the jury.

² See Laws 1892, ch. 688.

³ Ohio Rev. Stat., § 3313, sets forth that "all capital stocks, bonds, notes, or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. See § 766, *infra*.

But in *Union Trust Co. v. New York, etc. R. R., 1 R'y & Corp. L. J.* 50 (Ohio Com. Pl., 1887), the court, in applying this statute, held that, where \$50,000,000 of paid-up stock and \$15,000,000 of bonds are given to a syndicate, of which a director is a member, for \$18,000,000 of money, the stock and bonds and the mortgage securing the bonds are void.

⁴ Under the Ohio constitution and statutes, where a partnership having property worth \$37,500 turns it over to a corporation in payment for \$75,000 of stock issued as full paid, and the corporation becomes insolvent, the partners are liable on their stock to corporate creditors for the

also in Indiana, where the directors are liable if certain statutory provisions are violated.¹

In Maine the statutes are construed so as to render stockholders liable to corporate creditors where property is taken in payment at an overvaluation.²

In Wisconsin the statute prohibits the issue of stock at less than par, and prohibits the issue of bonds at less than seventy-five cents on the dollar.³

remaining \$37,500. *Gates v. Tippecanoe Stone Co.*, 48 N. E. Rep. 285 (Ohio, 1897). As to the common law in Ohio, see § 47, *supra*.

¹ Where a water-works company issues \$197,000 of stock as full paid and \$150,000 of mortgage bonds to a contractor for construction work, the work actually costing less than \$150,000, and the contractor pays to one of the directors \$6,000 in cash and gives to the two others \$20,000 each of the stock, such directors are liable to corporate creditors for the debts of the latter, under the Indiana statute rendering the directors liable where the provisions of the statute have been violated. *Clow v. Brown*, 48 N. E. Rep. 1034 (Ind., 1898). As to the common law in Indiana, see § 46, *supra*.

² In Maine it is held that where property purchased by individuals for \$6,666.67 is turned in to the corporation for \$240,000 of full-paid stock, the stockholders are liable on the stock as though the subscription price had not been paid. This decision is made under the statute that property shall be taken "at a *bona fide* and fair valuation thereof." In this case a part of the stock was turned back as treasury stock and sold at a small figure. The court expressly stated that its decision was based on the statute and that alone. *Libby v. Tobey*, 82 Me. 397 (1890). The liability of subscribers for stock under the Maine statutes where the stock is not properly paid up cannot

be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. *Alderson v. Dole*, 74 Fed. Rep. 29 (1896).

³ The Wisconsin statute that bonds should not be issued for less than seventy-five per cent of their par value does not apply to a transaction where old bonds are placed under a new mortgage and the holders of the old bonds receive new bonds in lieu thereof. *Mowry v. Farmers' L. & T. Co.*, 76 Fed. Rep. 38 (1896).

Under the Wisconsin statute, if an issue of stock as collateral for a debt of the company is illegal, the stock is void, and the holder thereof is not liable to corporate creditors who were not especially misled by his conduct. *Andrews v. National, etc. Works*, 76 Fed. Rep. 166 (1896).

Bonds issued by a corporation as collateral for a debt will not be ordered to be canceled because issued in violation of the state statute requiring payment in money or property of a certain percentage of their face value, unless the money received by the company upon the pledge of the bonds has been repaid or otherwise secured. *Andrews v. National, etc. Works*, 76 Fed. Rep. 166 (1896).

Under this statute stockholders who paid for their stock by turning in mining property known to them to be worth only one-tenth of the par value of the stock are liable for the remaining nine-tenths of the par value to corporate creditors. The

A statute prohibiting the sale of stock below par does not prevent the corporation from pledging it, and a sale of the stock by the pledgee below its par value is legal.¹

Minnesota also has a statute on this subject,² and there are

question of whether the creditors knew all the facts is a matter to be set up in defense. *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427 (1891).

¹ See § 465, *infra*.

² In the case *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893), the court refused to enjoin an issue of stock and refused to cancel stock already issued, although \$900,000 of bonds and \$945,000 of stock were issued for construction work which cost \$580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction based upon a present consideration, and having reference to legitimate corporate purposes." The court also said that "such a provision does not necessarily indicate a purpose to make the validity of every issue of stock or

bonds by a corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued."

In *First Nat. Bank v. Gustin, etc. Co.*, 42 Minn. 327 (1890), there is a *dictum* to the effect that in certain cases *bona fide* creditors may enforce payment of the difference between par value of the stock and the real value of the property turned in as payment for it in full.

In Minnesota it is held that where stock is issued for property materially overvalued, to the knowledge of the contracting parties, the stockholders are liable to subsequent corporate creditors (who became such without notice) for the difference between the par value of the stock and the real value of the property. *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28 (1896). In this case the property received was worth \$18,000 and was paid for by the issue of \$30,000 par value of stock.

A person purchasing stock issued for cash at less than par is liable thereon if he purchased with knowledge of the facts, even though the stock purports to be paid up. The statute of Minnesota which apparently authorized the issue of stock at less than par was construed away by the court and the issue of stock at less than par declared illegal. Hence, where a company issues \$400,000 of stock for \$5,000 and a license to manufacture and sell machinery under certain patents, the entire value of the latter being not more than \$130,000, the issue is fraudulent and the stockholders are liable for the \$270,000 difference. *Wallace*

statutes in Tennessee,¹ New Jersey,² and Iowa³ on this subject of watered stock.

v. Carpenter Electric, etc. Co., 73 N. W. Rep. 189 (Minn., 1897).

¹Under the Tennessee statutes that only cash or land "at a fair valuation" shall be received in payment for stock, the fact that the land was overvalued is insufficient. There must be proof of an "overvaluation which was intentionally fraudulent, or which was so gross as to be constructively fraudulent, as against corporate creditors." Jones v. Whitworth, 94 Tenn. 602 (1895).

Where land is bought for \$125,000, and \$35,000 thereof is paid, and then the land is conveyed to a corporation, subject to the \$90,000 lien, for \$250,000 of stock, this amounts to turning out \$250,000 of stock for an equity that cost \$35,000. Nevertheless, the stockholders are not liable unless overvaluation is alleged and proved. Shields v. Clifton Hill Land Co., 94 Tenn. 123 (1894). To same effect, Kelley v. Fletcher, 94 Tenn. 1 (1894).

²A railroad mortgage in New Jersey is not valid if it exceeds the amount of cash paid in on its capital stock. The mortgage, however, may be made in advance of construction. Where \$900,000 of bonds and \$900,000 of stock are issued to a contractor for work costing only \$900,000, the bonds are invalid, except in *bona fide* hands. On a bill filed by the receiver to cancel the mortgage the court so decreed, upon condition, however, that *bona fide* holders were first paid the amounts they paid for their bonds. Various parties' rights were passed on by the court. Directors and other participating parties holding bonds were allowed nothing. Baker v. Guarantee, etc. Co., 31 Atl. Rep. 174 (N. J., 1895). On appeal the court held that where the statutes prohibit debts in excess of the capital stock actually paid in, the excess-

ive bonds in the hands of a director cannot be enforced. Steelman v. Baker, 53 N. J. Eq. 672 (1896). But where one issue of bonds was legal and a second issue was illegal, a director holding bonds of the first issue may enforce them. Physick v. Baker, 53 N. J. Eq. 673 (1896).

A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See v. Heppenheimer, 36 Atl. Rep. 966 (N. J., 1897).

As to the common law in New Jersey, see § 46, *supra*.

Where a person subscribes for stock and afterwards payment is made in property at a gross overvaluation, the court may hold him liable for the difference between the actual value of the property and the par value of the stock, even though the company went through the form of canceling the subscription and issuing the stock as an original issue for property. Hebbard v. Southwestern, etc. Co., 36 Atl. Rep. 122 (N. J., 1896).

³In Osgood v. King, 43 Iowa, 478 (1876), where stock was issued for

In England, in 1863, the Companies Clauses Consolidation Act¹ prohibited the issue of new stock for a price less than its par value. An amendment thereto in 1869² struck out this prohibition, and gave power to the directors to issue stock on

land grossly overvalued, the court held the vendor liable for the par value of the stock less the actual value of the land. The person receiving the stock was a director at the time.

In *Jackson v. Traer*, 64 Iowa, 469 (1884), overruling *S. C.*, 16 N. W. Rep. 120 (1884), the stock was not issued to the construction company for the purpose of constructing the corporate works, but was issued after the construction was finished, and a cash debt was due them, which was paid by an issue of the stock to pay that debt already due.

The supreme court of the United States, in *Clark v. Bever*, 139 U. S. 96 (1891), refused to follow the decision in *Jackson v. Traer*, 64 Iowa, 469 (1884). Both of these cases grew out of the same transaction.

In *Chisholm v. Forny*, 65 Iowa, 333 (1884), where full paid stock was issued for a patent-right, in good faith, but the patent-right subsequently turned out to be worthless, the stockholders were held liable to corporate creditors as though no payment had been made.

Where \$100,000 of stock was issued for patents worth \$16,000, and \$50,000 of the stock was transferred by the patentees to a trustee for all the stockholders, a subscriber for \$1,500 of stock, who pays the company therefor \$500, is liable to corporate creditors for \$1,000, even though the \$1,500 of stock was a part of the \$50,000 of stock that the inventors retained and directed the company to issue to defendant. The defendant was not a *bona fide* subscriber or transferee, but was one of the promoters and was

president of the company. Fraud cannot be alleged in defense. *Boulton Carbon Co. v. Mills*, 78 Iowa, 460 (1889).

In the following case a very peculiar device was successful. Stock was issued conditionally that its issue be complete and binding when it became worth par, and that the price then to be paid for it to the company should be fifty cents on the dollar. The stock was issued and partly paid for, but never reached par in value. Held, that a participating stockholder, who was also a creditor, could not, nor could his assignee, enforce any liability. *Callanan v. Windsor*, 78 Iowa, 193 (1889).

Where land is sold to a corporation in exchange for stock, the actual value of the land being only thirty-six per cent of the par value of the stock, the holders of the stock are liable for the remaining sixty-four per cent to corporate creditors. *Wishard v. Hansen & Co.*, 68 N. W. Rep. 691 (Iowa, 1896).

In the case of *National Park Bank v. Peavey*, 64 Fed. Rep. 912 (1894), the court refers to the Iowa decisions on this subject of fictitiously paid-up stock as being based upon the Iowa statutes, and held that a corporate creditor might enforce the liability in an action at law as allowed by the Iowa statute.

In Iowa the court considers the value of the property, and credits on the stock only the actual value, and holds the stockholders and transferees with notice liable for the difference, even though the stock was issued as full-paid. *Tuthill Spring Co. v. Smith*, 90 Iowa, 331 (1894).

In *White v. Greene*, 70 N. W. Rep.

¹ See 26 & 27 Vict., ch. 118, § 21.

² See 32 & 33 Vict., ch. 48, § 5.

such terms and conditions as they saw fit. The Railway Companies Act¹ of 1867 is to the same effect.

In England the issue of stock for property or services is largely regulated by statute. On account of the many frauds perpetrated upon the public by the issue of stock for property taken at a gross overvaluation, parliament, in 1867, passed an act requiring all contracts whereby stock was issued for property or services to be publicly registered, under penalty of the payment being void.² Difficulty then arose as to what was the *status* and liability of a person receiving stock for property, in case the contract therefor was not publicly registered, as required by act of parliament. The courts finally decided that, if the sums due reciprocally were expressly offset, then that the stock was to be deemed paid for, notwithstanding the stat-

182 (Iowa, 1897), the court held the stockholder liable on stock where \$120,000 of stock had been issued for property which had just been purchased for \$20,000.

Where \$55,000, par value, of stock is issued for land worth \$8,000, a creditor of the corporation may hold the party receiving the stock liable for the remaining \$47,000, as the owner of stock unpaid for to that amount, and it is immaterial that the articles of incorporation recited that that amount of stock would be issued for the specified land. *Stout v. Hubbell*, 73 N. W. Rep. 1060 (Iowa, 1898).

There is a statute also in Utah. Where parties supposed that certain lands were public lands of the United States and open to patent, and they quitclaimed the same to a corporation in payment for stock, and it turns out that the lands had been previously patented by other parties, the former are liable on the stock to corporate creditors. *Henderson v. Turngren*, 9 Utah, 432 (1894).

Where mining claims which are worthless are conveyed to a company for \$200,000 of paid-up stock, the stock is not paid up, and the parties receiving the stock are liable for the par value thereof to corporate creditors.

Salt Lake Hardware Co. v. Tintic Milling Co., 13 Utah, 423 (1896).

¹See 30 & 31 Vict., ch. 127, § 27. See also *Webb v. Shropshire R'y*, [1893] 3 Ch. 307, where the issue was at a discount of sixty per cent under a statute.

²30 & 31 Vict., ch. 131, § 25. "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made, in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares." Where the stockholders apply long after incorporation for leave to file with the public register the contract whereby stock is issued for property, the court will require them first to provide for existing debts. *Re Darlington Forge Co.*, L. R. 34 Ch. D. 522 (1887).

A mere vote of stock to a director in compensation for his services does not render him liable thereon for failure to register the contract, unless he knows of the entry of his name as holder of the shares or accepts certificates for the same. *Arnot's Case*, L. R. 36 Ch. D. 702 (1887).

ute.¹ But a mere general understanding that the property is payment for the stock is insufficient. The prohibition in the statute then applies, and payment in cash will have to be made upon a winding up.² The point decided by these cases seems to have been misapprehended in a few American cases.³

Frequently actions herein are against corporate officers who directly or indirectly receive the stock.⁴ This class of cases is considered in the next section.

¹Pell's Case, L. R. 5 Ch. App. 11 (1869); *Ex parte Clark*, L. R. 7 Eq. Cas. 550 (1869); *Re British Farmers', etc. Co.*, L. R. 7 Ch. Div. 533 (1878). See also § 23. In *Spargo's Case*, L. R. 8 Ch. App. 407 (1873), the court said: "If parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid." See also *Maynard's Case*, L. R. 9 Ch. App. 60 (1873); *Re Vulcan Iron Works*, *Law Times*, May, 1885, p. 61.

²*Dent's Case*, L. R. 15 Eq. Cas. 407 (1873); *Fothergill's Case*, L. R. 8 Ch. App. 270 (1873); *Crickmer's Case*, L. R. 10 Ch. App. 614 (1875); *Rowland's Case*, 42 L. T. Rep. 785 (1880). A person taking stock at a discount for property overvalued may withdraw. *Re Midland, etc. Co.*, 60 L. T. Rep. 666 (1889).

³See *Wetherbee v. Baker*, 35 N. J. Eq. 501 (1882).

⁴Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. *Hirsche v. Sims*, 71 L. T. Rep. 357 (1894).

Although none of the stockholders and creditors of a company which is in difficulties object to a new issue

of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company the scheme is illegal. Innocent purchasers of the stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus. *London Trust Co. v. Mackenzie*, 68 L. T. Rep. 380 (1893).

A statement filed with the state commissioner as required by statute, in regard to the amount of the paid-up stock, is not such a representation as will sustain an action for damages for fraudulent representations inducing a person to take the notes of the company. *Hunnewell v. Duxbury*, 154 Mass. 286 (1891).

In an action by a treasurer for pay for his services it is no defense that the corporation, with a capital fixed at \$1,000,000, had \$50,000 paid in in cash to comply with the statute, and then the remaining capital stock, \$950,000, together with the cash so paid in, were issued for two patents, and that the treasurer checked out therefor the said \$50,000, being the part unexpended at that time. *Sears v. Kings, etc. R'y*, 156 Mass. 440 (1892).

The fact that the corporate officers have filed a false statement as to the amount of paid-up capital stock will not sustain an action for damages for fraud in inducing a party to take the notes of the corporation. Representa-

§ 48. *Liability of the officers of the corporation.*—There is great difficulty in defining clearly and accurately the liability of the corporate officers herein. This is because the officers may have committed an *ultra vires* or fraudulent act; or may have participated in the profits as promoters; or may have received a gift of part of the stock from the parties to whom they issued it.

There are few cases holding a director liable for loss to the corporation where an issue of its stock for money or property less in value than the par value of the stock has been made. Such an action would be similar in its character to the numerous cases against directors for their frauds and *ultra vires* acts.¹

In a suit of this character, however, against an officer of the corporation, he is liable not for the par value of the stock, less the value of the property or labor received therefor, but at the most he can be held liable only for the market value of the stock, less the value of the labor or property received by the corporation.²

Where, however, the directors receive a part of the stock themselves, either by its issue directly to themselves, or by being secret partners with those to whom it is issued, or by a gift to them from the parties to whom it is issued, then the directors may be compelled to account to the corporation for the stock actually received by themselves. In such a case, however, the directors, as such, cannot be made liable on the capital stock issued to third persons and still retained by them. The directors are liable only to the extent that they themselves received stock. This liability arises from the principle of law

tions as to the credit of a corporation must be in writing in order to be actionable under the Massachusetts statute. *Hunnewell v. Duxbury*, 157 Mass. 1 (1892).

The statute of limitations runs against an action by taxpayers against the officers and promoters of a railroad to which municipal aid was voted, to compel them to account for watered stock and bonds and to cause the stock, bonds, and mortgage to be canceled. *Allen v. Wisconsin*, etc. R'y, 90 Iowa, 473 (1894).

¹ See Part IV; also preceding note.

² *Continental Tel. Co. v. Nelson*, 49 N. Y. Super. Ct. 197 (1883), where the question as to what was the market value was submitted to the jury. See also *Nott v. Clews*, 14 Abb. N. C. (N. Y.) 437 (1883), overruling a demurrer. In this case, however, the directors had received part of the stock as a gift. See also *Osgood v. King*, 42 Iowa, 478 (1876); but see *Flagler, etc. Co. v. Flagler*, 19 Fed. Rep. 468 (1884); *Langdon v. Fogg*, 18 Fed. Rep. 5 (1883); S. C., in state court, 14 Abb. N. C. (N. Y.) 435 (1883).

that a director must account to his corporation for any secret gift that may be made to him by persons contracting with the corporation; and must account also for profits made by his secret participation in contracts between the corporation and third persons.¹ In such cases the director is liable to the corporation or its creditors, not for the par value of the stock received by him, but for the actual value of the stock, or for the profit or price which he received therefor.² A director is dis-

¹ See §§ 649, 650, and cases in notes thereto.

² In *Carling's Case*, L. R. 1 Ch. D. 115 (1875), where the person receiving stock for property taken at an overvaluation gave part of it to a corporate director, the court held that the corporation could demand of the director either the stock or the profit realized by him, or the profits thereby lost by the corporation, but could not compel him to pay the full par value of the stock. In *De Ruvinne's Case*, L. R. 5 Ch. D. 306 (1877), where shares of stock were issued as paid up to a person for services palpably overvalued, and he transferred a part of the stock to a director, *De Ruvinne*, the court said: "If the company attempt to make the appellant [director] a contributory, and they allege fraud in the original agreement by which he was to take the shares, they must either throw over the agreement altogether or they must take it altogether; they cannot adopt it as to one part and reject it as to the rest." The court said the director could be held liable for breach of trust and be made to pay to the corporation the selling value of the shares; and since some of the stock was sold at par, he was chargeable with the par value of the stock so received by him.

In *Anderson's Case*, L. R. 7 Ch. D. 75, 94 (1877), the court held that, if shares were improperly issued to a director at a discount, the contract might be set aside and the consideration returned, or the profits realized

by him might be recovered. In *Currie's Case*, 3 De G., J. & S. 367 (1863), where shares were taken both directly and indirectly by the corporate officers for property and services grossly overvalued, the court held that the transaction might be undone altogether for fraud, but there was no liability on their part to contribute anything on the shares. The only remedy is to set aside the transaction and recover the profits thereof. *Langdon v. Fogg*, 18 Fed. Rep. 5 (1883); S. C., 14 Abb. N. C. (N. Y.) 435, holding that the directors are not liable to the corporation for the par value of the stock issued to their dummy for property and then transferred to themselves. See also § 650, *infra*, and cases in notes.

In the case of *Re Ambrose Lake, etc. Co.*, L. R. 14 Ch. D. 390 (1880), it was held that where all the stockholders acquiesced, and there were no creditors' rights involved, the corporation cannot recover from its directors profits realized by them from shares issued to them as paid up in consideration of property taken at a gross overvaluation. The corporation was held to be in no position to complain. In *Van Cott v. Van Brunt*, 82 N. Y. 535 (1880), where the facts were very much the same as in the preceding case, the court said (p. 541): "If the defendant [director and president] had realized a sum beyond the amount actually expended, there might have been, perhaps, some ground for claiming that

qualified from being interested in a construction contract with the company;¹ but if all the then existing stockholders assent thereto, and creditors are not injured, such a transaction is legal.²

There is still another class of cases, in which a director acts also as a promoter of the company and receives stock for his services. He then is liable to account to the corporation therefor, not only as a director, but also as a promoter.³

Another class of cases may exist where the directors vote stock to themselves in payment for their services to the company.⁴

Whether the directors are liable herein to purchasers of stock or to corporate creditors in an action for deceit is an open question.⁵

the arrangement should enure to and for the benefit of the company."

¹ See §§ 649, 662, *infra*.

² See §§ 39, 662, 735, and ch. XLIV.

³ See the important case of *Chandler v. Bacon*, 30 Fed. Rep. 538 (1887); also, § 651, *infra*, and cases cited. In Iowa, where "watered" stock is given as a gift by the patentees to a promoter, who afterwards became the first president of the company, he is liable to corporate creditors for all the "water" there is in the stock. *Boulton Carbon Co. v. Mills*, 78 Iowa, 460 (1889).

⁴ See § 657, *infra*.

⁵ See §§ 157, 158, 355; also n. 4, p. 145.

A sale or pledge of stock stamped "non-assessable," when in fact it was not legally paid up, renders liable for false representations the president and secretary who made such sale or pledge, and who knew that it was not paid-up stock. *Windram v. French*, 151 Mass. 547 (1890).

In *Bartholomew v. Bentley*, 15 Ohio, 659 (1846), certain persons incorporated a bank, incurred large debts, then sold their stock to the bank and left the creditors nothing. A creditor brought an action on the case for fraud. The court sustained the

action, and said: "If the defendants, with the design to defraud the public generally, have knowingly combined together and held forth false and deceptive colors, and done acts which were wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury; and they cannot place between him and justice, with any success, the charter of the German Bank of Wooster, whether it be valid or void, forfeited or *in esse*. Neither a good nor a bad thing may be falsely used for purposes of deception and made a scapegoat for responsibility. Nor is it material that there should have been an intention to defraud the plaintiff in particular. If there was a general design to defraud all such as could be defrauded by taking their paper issues, it is sufficient, and the plaintiff may maintain his suit, provided he has taken the paper and suffers from the fraud. . . . The act incorporating the president and directors of the German Bank of Wooster, admitting it to be in force, conferred no authority upon any person to hold out false colors to deceive the public, no authority to issue bills without the means of re-

The officers of the corporation who participate in the issue of stock as paid up, when it has not been fully paid, are liable to persons purchasing such stock for damage thereby suffered.¹ In Massachusetts, by statute, corporate officers are made liable for corporate debts, if they issue stock for property at an unfair valuation of the latter.²

§ 49. *Liability of the persons purchasing the stock with notice.*—It seems to be generally assumed, as a matter of course, that persons purchasing stock with notice that it had not been paid up, although in fact it had been issued as paid up, are liable on such stock to the same extent that their transferrers were liable.³

deeming them; and those who combined to use it for the purposes of swindling acted for themselves rather than as agents of the bank."

Creditors of a corporation cannot hold the directors liable for fraud, deceit, etc., in forming a sham corporation, when no misrepresentations can be traced to them. Mere statements as to the amount of capital stock are insufficient. *Brackett v. Griswold*, 112 N. Y. 454 (1889).

¹ *Cross v. Sackett*, 6 Abb. Pr. 247 (1858); *Re Gold Co.*, L. R. 11 Ch. D. 701 (1879). See also § 48, *supra*.

² Mass. Stats. 1875, ch. 177, § 2.

³ *Upton v. Tribilcock*, 91 U. S. 45 (1875). In *Coleman v. Howe*, 154 Ill. 458 (1895), the court said: "Where a person purchasing stock issued as paid up has notice that it has not been paid, his liability is the same as that of the party who transferred it to him." But they are not liable if any prior owner was *bona fide* and without notice. *Barrow's Case*, L. R. 14 Ch. D. 432 (1880). A transferee of "watered" stock taking with notice is liable the same as his transferrer. *Boulton Carbon Co. v. Mills*, 78 Iowa, 460 (1889); *White v. Greene*, 70 N. W. Rep. 182 (Iowa, 1897); 50 N. E. Rep. 19.

In Maine it is held that the transferee of stock issued as paid up is not liable to a corporate creditor thereon

even though the transferrer did not pay the corporation for the stock, and even though the transferee knew that fact. *Morgan v. Howland*, 89 Me. 484 (1897). Cf. 53 Pac. Rep. 959.

Where \$100,000 of the stock of an Illinois corporation is issued to parties who agree to turn in a patent therefor, and the patent is never turned in, and in fact turns out to be of no value, the parties receiving the stock with notice are liable thereon to *bona fide* corporate creditors, even though such stock recites on its face that it is fully paid. *Van Cleve v. Berkey*, 44 S. W. Rep. 743 (Mo., 1898).

Where the certificate of stock states on its face that it is "fully paid up" and yet that it is subject to assessment for certain purposes, the holder is bound to investigate. *Wishard v. Hansen, etc. Co.*, 68 N. W. Rep. 691 (Iowa, 1896).

In the case *Gilkie, etc. Co. v. Dawson, etc. Co.*, 46 Neb. 333 (1895), where \$240,000 par value of stock was issued for an equity in land, such equity being worth only \$20,000, the court held that the transaction was fraudulent *per se*, and the holders of the stock were liable for the difference between its par value and the \$20,000; and the court also held that the transferees taking with full knowledge of the facts were also liable.

§ 50. *Liability of the bona fide transferees without notice.*—A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a purchaser has a right to rely on the representations of the corporation that the stock is paid up. Difficulty sometimes arises in determining what will constitute a sufficient representation that the stock is paid up. A representation by the corporate agents that the full par value will not be required is insufficient.¹ The word "non-assessable," stamped or printed or written on the face of the certificate, is not a sufficient representation that the stock is paid up, so as to protect a *bona fide* purchaser thereof, where the certificate also shows that only twenty per cent has been paid thereon.²

Where, however, a statement is made on the face of the certificate that it is paid-up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability.³

¹ Webster v. Upton, 91 U. S. 65 (1875); Upton v. Tribilcock, 91 U. S. 45 (1875).

² Webster v. Upton, 91 U. S. 65, 71 (1875); Sanger v. Upton, 91 U. S. 56 (1875).

³ Young v. Erie Iron Co., 65 Mich. 111 (1887); *Re Macdonald, etc. Co.*, 69 L. T. Rep. 567 (1893); Albitztigui v. Guadalupe, etc. Co., 92 Tenn. 598 (1893). One who purchases in good faith, in the open market, stock of a corporation which purports, on the face of the certificates, to be full paid and non-assessable, is not liable for assessments on such stock, though in fact it had not been fully paid. Rood v. Whorton, 67 Fed. Rep. 434 (1895); S. C., 74 Fed. Rep. 118 (1896). In Coleman v. Howe, 154 Ill. 458 (1895), the court said: "A purchaser or assignee of stock which has not been fully paid does not become liable to the corporate creditors for the unpaid balance, where the stock has been issued as fully paid, and he has ac-

quired the same in good faith, and without notice that it has not been fully paid." In Waterhouse v. Jamieson, L. R. 2 H. L. (Sc.) 29 (1870), where the stock was purchased in open market, the court said: "Here the appellant is a *bona fide* holder of shares upon which, no doubt, there was a false statement made by the company, of which he had no knowledge, and as to which he was under no obligation to inquire, and therefore he cannot be subjected to liability by having imputed to him a knowledge of the falsehood." In Brant v. Ehlen, 59 Md. 1 (1882), the court said: "Where shares are issued by the company to the subscriber as full-paid shares, and are sold by the subscriber as such, there is no ground on which a promise can be implied, on the part of the purchaser without notice, to be answerable either to the company or to its creditors, should the representations on the faith of which he purchased prove to be false."

"Fully paid-up shares" mean "shares upon which the whole amount that could be called had been called up."¹ If the corporation states to a person about to buy stock that it is full paid, and he purchases it, he cannot be held liable on an unpaid subscription.²

A purchaser of stock is entitled to rely on statements in the corporate books that the stock is paid up.³ The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed "paid up" in his hands, and he is protected as a *bona fide* purchaser, even though there is nothing on the face of the certificates stating that they are paid up.⁴ This can now

He could not be held liable on the ground of contract, because he never agreed to purchase any other shares than full-paid shares; and if it be said that the shares were fraudulently issued, he could not be held liable on the ground of fraud, because he was in no sense a party to the fraud." In *Steacy v. Little Rock, etc. R. R.*, 5 Dill. 348 (1879); S. C., 22 Fed. Cas. 1142, Judge Dillon examined, at considerable length, the reasons of the rule protecting *bona fide* purchasers of stock issued as paid up, and sustained the rule itself. See also *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1004 (1878). One case, *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, lays down a different doctrine. The court says: "The assignee of shares can be in no better condition than the assignor. . . . The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignors, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid, yet creditors are not bound thereby; and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid." This case must be considered poor law. Where the charter and the certifi-

cates of stock provide that the stock shall be subject to assessment to pay a certain mortgage, it is immaterial that the stock states on its face that it is paid up. *Western Imp. Co. v. Des Moines Nat. Bank*, 72 N. W. Rep. 657 (Iowa, 1897). Cf. 50 N. E. Rep. 19.

¹ *Bloomenthal v. Ford*, [1897] A. C. 156.

² *Rochester, etc. Co. v. Roe*, 7 N. Y. App. Div. 366 (1896).

³ *Ersine v. Lowenstein*, 11 Mo. App. 595 (1881).

⁴ *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496 (1880); *Foreman v. Bigelow*, 4 Cliff. 508 (1878); S. C., 9 Fed. Cas. 427, as explained in 8 Mo. App. 496; *Johnson v. Lullman*, 15 Mo. App. 55 (1884), where the court says: "If any presumption of fact arises from the face of a stock certificate in customary form, as was the one in this case, it is that the stock . . . is fully paid for." See also *Ersine v. Loewenstein*, 82 Mo. 301 (1884); *Cleveland, etc. Co. v. Texas, etc. R'y*, 27 Fed. Rep. 250 (1886).

If a certificate of stock is silent on its face as to whether it is full paid or not, a *bona fide* purchaser is protected in considering it full-paid stock. *West Nashville, etc. Co. v. Nashville Sav. Bank*, 86 Tenn. 252 (1888). Cf. *Burkinshaw v. Nicolls*, L. R. 3 App. Cas. 1004, 1017 (1878). In

be laid down as the established rule. It is based on sound public policy, favoring, as it does, the transfer of personal property, and the *quasi*-negotiability of stock, and discountenancing secret liens and constructive notice.

A purchaser in open market of stock represented to be paid up by a statement to that effect on the certificate is presumed to be a *bona fide* purchaser. Hence there has arisen the well-established rule, both in America and England, that a *bona fide* purchaser for value, and without notice, of stock issued as paid up, is not liable for any part of the par value which may not have been paid.¹

Brant v. Ehlen, 59 Md. 1 (1882), the court says: "The purchaser is not bound to suspect fraud where everything seems fair. . . . Any other doctrine would virtually destroy the transferable nature of such shares, and paralyze the whole of the dealings in the stock of corporations."

A party purchasing a certificate of stock which does not state whether it is paid up or not may assume that it is paid up, and will be protected in that assumption. *Du Pont v. Tilden*, 42 Fed. Rep. 87 (1890).

An inquiry by a purchaser of stock of corporate officers, as to whether it was full-paid stock, must be made to officers having authority to speak for the corporation. *Browning v. Hinkle*, 48 Minn. 544 (1892). See also § 257, *infra*.

¹ *Re Concession Trust*, [1896] 2 Ch. 757; *Troup v. Horbach*, 74 N. W. Rep. 326 (Neb., 1898). In *Re British Farmers', etc. Co.*, L. R. 7 Ch. D. 533 (1878); *aff'd*, L. R. 3 App. Cas. 1004 (1880), the court held that, if the *bona fide* purchaser were not protected, "no person buying shares in the market as paid-up shares would be safe, for he would get nothing more than a certificate to show they were paid up. . . . Obviously such a construction would destroy the transferable nature of shares altogether." See also *Foreman v. Bigelow*, 4 Cliff. 508 (1878);

S. C., 9 Fed. Cas. 427; *McCracken v. McIntyre*, 1 Duv. (Can.) 479 (1877); *Steacy v. Little Rock, etc. R. R.*, 5 Dill. 348 (1879); S. C., 22 Fed. Cas. 1142; *Jackson v. Sligo, etc. Co.*, 1 Lea (Tenn.), 210 (1878); *Brant v. Ehlen*, 59 Md. 1 (1882); *Waterhouse v. Jamieson*, L. R. 2 H. L. (Sc.) 29 (1870). *Cf.* *Crickmer's Case*, L. R. 10 Ch. App. 614 (1875). *Contra*, *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411. A *bona fide* purchaser of stock in the open market is not liable on the stock to corporate creditors, although it was issued for cash at less than par, the certificate of stock reciting on its face that it was fully paid up. The court held the party to be a *bona fide* purchaser, although he knew that the company had issued stock at a discount, but did not know that the stock which he purchased was a part of such stock issued at a discount. He was not bound to inquire of the company. *Re New Chile & Co.*, 68 L. T. Rep. 15 (1892). It is immaterial that the payment in stock issued as paid up turns out to have been valueless. The *bona fide* purchaser is protected, and the corporation must allow registry by him. *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69 (1879). In *Wintringham v. Rosenthal*, 25 Hun, 580 (1881), the court held that a *bona fide* purchaser of stock, which he purchased supposing

Where a subscriber who has not yet taken out his certificate of stock instructs the corporation to issue the certificates to a designated transferee, the latter is not held to be the original allottee of that stock; and, even though the stock was irregularly issued as paid-up stock, he can claim to be a *bona fide* transferee without notice.¹

E. ISSUE OF WATERED STOCK BY A STOCK DIVIDEND.

§ 51. *Third method: Issue by stock dividends.*—The third method of issuing fictitiously paid-up stock is by a wrongful use of the power to make stock dividends. It seems to be generally conceded that if the capital stock and the actual property of the corporation are not permanently increased to the extent of the par value of the stock distributed as a dividend, then that the issue of stock by such dividend is irregular, and

it to be paid up, is not liable for the unpaid par value. The stock was issued by a bank, evidently on a cash subscription. This case practically overrules *Mann v. Currie*, 2 Barb. 294 (1848). The general railroad act of New York (Laws 1850, ch. 140, § 10) prescribed that each stockholder should be liable "to an amount equal to the amount unpaid on the stock held by him." In *Tasker v. Wallace*, 6 Daly, 364, 374 (1876), the court held that under this statute, "as between a stockholder and a creditor, it is wholly immaterial whether he was a *bona fide* and innocent purchaser of stock which the vendor assured him had been paid." This remark was, it seems, a *dictum*, and, being by an inferior court, is doubtful as an authority. The representation, moreover, was not on the face of the certificate, nor was it made by the corporation. In the case of *Hubbell v. Meigs*, 50 N. Y. 480, 489 (1872), where the purchaser of Wisconsin railroad stock sued his vendor for damages for deceit on the ground, among others, that the stock had been issued fictitiously as paid up, the court said: "It is unnecessary to determine whether

the corporation was authorized by its charter to sell its stock at less than par, or whether, in so selling, its officers did not violate their duty. The plaintiff was a *bona fide* purchaser, and, being such, acquired a valid title to the stock transferred to him." See also 50 N. E. Rep. 19.

¹ *Young v. Erie Iron Co.*, 65 Mich. 111 (1887); *Carling's Case*, L. R. 1 Ch. D. 115 (1875). A *bona fide* purchaser of certificates of stock, which recite on their face that they are fully paid up, is protected even though the vendor was the party to whom the stock was issued at a discount, and even though he caused the corporation to issue the stock directly from the corporation to such purchaser. *Re Building, etc. Co.*, 73 L. T. Rep. 506 (1895). Nominees of a person to whom full-paid stock is to be issued, same as transferees, are not liable, though the original issue was to them. *Re Macdonald, etc. Co.*, 69 L. T. Rep. 567 (1893). See also § 62, *infra*. Cf. *Rowland's Case*, 42 L. T. Rep. 785 (1880); *Re British Farmers', etc. Co.*, 13 Weekly Notes, 81 (1878); *Re Vulcan Iron Works*, Law Times, 1885, p. 61.

under certain circumstances fraudulent.¹ A stock dividend may take the shape of an issue of stock for cash at less than the par value.²

In some of the states stock dividends are prohibited by constitutional or statutory provisions.³

¹In *Williams v. Western Union Tel. Co.*, 93 N. Y. 162 (1883), the court (p. 189) said that a stock dividend "could be declared by a corporation without violating its letter, its spirit, or its purpose. . . . There is no public policy which, in all cases, condemns such dividends. . . . No harm is done to any person, provided the dividend is not a mere inflation of the stock of the company, with no corresponding values to answer to the stock distributed. . . . So long as every dollar of stock issued by a corporation is represented by a dollar of property, no harm can result to individuals or the public from distributing the stock to the stockholders." *Howell v. Chicago, etc. R'y*, 51 Barb. 378 (1868), is to the same effect. In *Bailey v. Railroad Co.*, 22 Wall. 604 (1874), the court (p. 635) said that net earnings, however expended or invested, belong "to the stockholders, and may be distributed, as they may direct, in dividends of stock . . . or by a sale of property." See also ch. XXXII, *infra*. Where the company is under obligations to issue stock to represent interest on subscriptions until dividends are declared, a stock dividend does not stop the interest. *Hardin County v. Louisville, etc. R. R.*, 92 Ky. 412 (1891); 86 Fed. R. 505.

²*Re Owen, etc. Co.*, 21 Ont. Rep. (Can.) 349 (1891).

³Ill. Const., art. XI, § 13. In Wisconsin by statute. R. S. 1878, § 1753, amended by ch. 93, Laws 1881. In Massachusetts railway corporations are by statute prohibited from declaring a stock dividend except by authority of the general court. Mass. Pub. Stat., ch. 112, § 61. It has been

held not a violation of this statute for a railway company to distribute among its shareholders, without the assent of the general court, shares of its own stock which it had purchased from the commonwealth, when it had legislative authority for such purchase and distribution. *Commonwealth v. Boston, etc. R. R.*, 142 Mass. 146 (1886). See § 287; 50 N. E. R. 648.

If the tangible property of the corporation is actually in excess of the par value of the capital stock, then a stock dividend to the extent of that excess would, it seems, be legal; but the proceedings to declare the stock dividend must show these facts, or the dividend will be enjoined. *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604 (1887). The court changed the reasoning of its opinion as reported in 2 So. Rep. 727.

In one point of view stock dividends are objectionable. They are issued to represent the increased value of the corporate property as it stands. In the case of railroads, this increase of value arises very largely from the increased value of the eminent domain franchises which the corporation is using. These franchises belong to the people, and the people are entitled to the increased value of them. Such an increased value could be readily secured to the people by a reduction of railroad charges. But by stock dividends, based on this increased value of the franchise, the railroad is able, by increasing its stock, to divide all profits and yet not declare more than a six or eight per cent dividend. The smallness of the dividend prevents a legislative reduction of rates. If,

The decided tendency of the law, however, is to sustain and even encourage stock dividends, where they are regularly and legally made by adding to the property representing the capital stock further property to represent the stock dividend. By

however, no stock dividend were allowed, and the increased earning capacity of the railroad gave large profits, such profits would have to be employed in improving the property or in making extravagant dividends, which would justify a reduction of railroad rates. It is urged, in reply to this view, that about three out of four railroad enterprises are the cause of total loss to their projectors, and that the fourth should be made to pay more largely, by reason of the risk incurred; also that large capital and great ability in managing enterprises of such magnitude should be more fully compensated.

Mr. Swan, in *An Investor's Notes on American Railroads* (1886), p. 92, presents an ingenious argument on this question when he says: "The assertion by a state of a right to fix rates and limit dividends by *ex post facto* legislation, without regard to existing charters and without compensation or indemnity, is, in fact, the barely disguised assertion of a right to confiscate to a greater or less extent the increment of value legitimately accruing to a going concern. In connection with a railroad the increment of value cannot with any semblance of propriety be described as an 'unearned' increment. In a vast number of instances an American railroad may be said to create the settlement of population which is destined to furnish passengers and to produce freight. Reflex activities are of course stimulated, and contribute in their turn to the development of traffic; but in many instances the railroad itself primarily constitutes the determining condition of settlement in a particular

place, and of the transportation of passengers and merchandise through a particular channel. Subject to the restraints of equitable regulation, the right of a constructing company to the increasing benefit of the business which it builds up by its outlay and its skill is no less real than that of the founder of a purely commercial or professional business to the increasing benefit of his capital or ability."

Alexander on *Railway Practice* (1887), p. 37, says with some force: "It is asserted that much of the stock of our railroads is not legitimate, but is water. Such an argument may apply against any particular railroad that earns exorbitant dividends, but against the system as a whole it does not. For it would be easy to show that for every dollar of water in existing stocks, two dollars of the money of railroad investors has been lost like water spilt in the sand. Much of it was lost, doubtless, by bad judgment; but the fact remains that our existing system of railroads, as a whole, has cost fully as much as it is capitalized at. Scarcely one of them was originally built as it stands to-day. The earlier ones have been rebuilt and re-equipped three or four times, as experience pointed out necessary improvements. Many of them, too, were built before the business really demanded them, and the loss from this source has been enormous. . . . If the state would guarantee the interest upon money legitimately invested in railroad construction, investors would readily furnish all that might be desired, and railroads could and would be built without watered stock. But the state very properly

such an act the responsibility of the corporation is increased, creditors are more secure, inasmuch as there is more property to respond to their claims, and the stockholders have increased their investment by adding the profits to the capital stock instead of distributing them by a cash dividend. Frequently, in the consolidation of companies or the sale or lease of one to the other, a large amount of stock is issued to the stockholders of the companies so consolidating, leasing, or selling. This issue of stock often partakes of the nature of a stock dividend. Illustrations of such issues are given elsewhere.¹

refuses to assume any risk, and leaves it to be borne entirely by the investor. The latter, then, having all the risk, naturally demands to have also all the chances of profit if the road turns out a success. He discounts the future, and takes watered stock to represent what he hopes will be his earnings. That is the only way that communities wanting railroads can induce investors to supply the funds. . . . But I record my

conviction that the practice of stock-watering should be prohibited, without much hope of ever seeing it done, and more on the ground that it is against public policy to make it easy for men to build railroads or float any enterprises with other people's money, than from the fear of railroads being enabled to practice extortion by the possession of watered stock."

¹ See § 892, *infra*, notes.

CHAPTER IV.

METHOD OF SUBSCRIBING—PARTIES TO SUBSCRIPTIONS—ACTION TO ENFORCE SUBSCRIPTIONS.

A. METHODS OF SUBSCRIBING.

- § 52. Generally no formalities necessary.
53. Informalities, irregularities, and mistakes in subscriptions.
54. Various defenses to subscriptions.
55. Proof of subscription.
56. The English rule.
57. Subscriptions taken by commissioners.
58. Subscriptions in excess of the capital stock.
59. Subscriptions and organization where there is a special charter and no commissioners are provided for.
60. Subscriptions delivered in escrow.
61. Liability of corporation for refusal to issue a certificate of stock.
62. Substitution of subscribers before the incorporation, change in the proposed enterprise, and alterations in subscription paper.
63. Right to recover money advanced on shares upon a failure to organize the company.
- B. WHO IS COMPETENT TO SUBSCRIBE FOR STOCK.
64. Corporations generally not.

- § 65. Commissioners, directors, partners, etc., as subscribers.
66. Married women as subscribers.
67. Infant as subscriber.
68. Agent as subscriber.
69. Subscriptions taken by an unauthorized agent of corporation.
70. Unissued or increased capital stock—Right to subscribe therefor.

C. AN ACTION LIES TO COLLECT SUBSCRIPTIONS.

71. A subscription implies a promise to pay, which is enforceable without proof of any particular consideration.
72. Such is the rule for subscriptions before incorporation as well as those after—Acceptance of the subscription—Withdrawal.
73. The New York rule.
74. In New England an express promise or express statute is necessary to support an action to collect subscriptions.
75. Professor Collin's rules on this subject.
76. Stockholders' agreements to guarantee company debts and stockholders' contracts for the benefit of the corporation.

A. METHODS OF SUBSCRIBING.

§ 52. *Generally no formalities necessary.*—The contract of subscription for shares of stock in an incorporated company may be entered into in various ways. Whenever an intent to become a subscriber is manifested, the courts incline, without particular reference to formality, to hold that the contract of subscription subsists. It is, as in the case of other contracts, very much a question of intent. Formal rules are for the most

part disregarded.¹ And in general a contract of subscription may be made in any way in which other contracts may be made.² Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation.³ When one accepts or assumes the position and duties and claims the right and privileges and emoluments of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all.⁴

¹ Quoted and approved in *Ventura, etc. R'y v. Collins*, 46 Pac. Rep. 287 (Cal., 1896).

² *Blunt v. Walker*, 11 Wis. 334, 349 (1860).

³ *Fry v. Lexington, etc. R. R.*, 2 Metc. (Ky.) 314 (1859); *Wellersburg, etc. Co. v. Young*, 12 Md. 476 (1858); *Gill v. Kentucky, etc. Co.*, 7 Bush (Ky.), 635 (1870); *Oler v. Baltimore, etc. R. R.*, 41 Md. 583 (1874); *Schaeffer v. Missouri, etc. Co.*, 46 Mo. 248 (1870).

⁴ *Sanger v. Upton*, 91 U. S. 56 (1875); *Upton v. Tribilcock*, 91 U. S. 45 (1875); *Wheeler v. Millar*, 90 N. Y. 353 (1882); *Hamilton, etc. Co. v. Rice*, 7 Barb. 157 (1849); *Dorris v. French*, 4 Hun, 292 (1875); *Boston, etc. R. R. v. Wellington*, 113 Mass. 79 (1873); *Ex parte Besley*, 2 Mac. & G. 176 (1850); *Clark v. Farrington*, 11 Wis. 306 (1860); *Jewell v. Rock River Paper Co.*, 101 Ill. 57 (1881); *Haynes v. Brown*, 36 N. H. 545 (1858); *Chaffin v. Cummings*, 37 Me. 76 (1853); *Chester Glass Co. v. Dewey*, 16 Mass. 94 (1819); *Griswold v. Seligman*, 72 Mo. 110 (1880); *Boggs v. Olcott*, 40 Ill. 303 (1866); *Musgrave v. Morrison*, 54 Md. 161 (1880); *Phoenix, etc. Co. v. Badger*, 67 N. Y. 294 (1876); *S. C.*, 6 Hun, 293 (1875); *Palmer v. Lawrence*, 3 Sandf. 161 (1849); *Philadelphia, etc. R. R. v. Cowell*, 28 Pa. St. 329 (1857); *Cheltenham, etc. R'y v. Daniel*, 2 Q. B. 281 (1841); *West Corn-*

wall R'y v. Mowatt, 15 Q. B. 521 (1850). And see the dissenting opinion of Lord St. Leonards in *Spackman v. Evans*, L. R. 3 H. L. Cas. 171, 197 (1868); *Harrison v. Heathorn*, 6 Man. & G. 81 (1843); *Ness v. Angas*, 3 Exch. 805 (1849); *Ness v. Armstrong*, 4 Exch. 21 (1849); *Moss v. Steam Gondoia Co.*, 17 C. B. 180 (1855); *Bailey v. Universal, etc. Assoc.*, 1 C. B. (N. S.) 557 (1857). The mere acts of interested parties by which certain leases in lands are turned into the corporation, it being understood that payment for the property and services was to be a certain amount of stock, may constitute stockholdership, although no formal record is made of the transaction and agreement, and although no certificates of stock are issued to anybody. *Holland v. Duluth, etc. Co.*, 65 Minn. 324 (1896).

Underwriting "means an agreement entered into before the shares are brought before the public, that in the event of the public not taking up the whole of them or the number mentioned in the agreement, the underwriter will take an allotment of such part of the shares as the public has not applied for." The underwriter is liable on the stock. *Re Licensed, etc. Assoc.*, L. R. 42 Ch. D. 1 (1889).

Merely accepting and holding a certificate of stock is sufficient to constitute one a stockholder.¹

There have been various *dicta* to the effect that a subscription cannot be entered into by parol;² but the later and better opinion is that such a subscription is valid and binding.

¹ *Upton v. Tribilcock*, 91 U. S. 45 (1875); *McLaughlin v. Detroit*, etc. R'y, 8 Mich. 100 (1860); *Stutz v. Haldeman*, 41 Fed. Rep. 531 (1890); *Barron v. Burrill*, 86 Me. 66, 72 (1893). See also *McHose v. Wheeler*, 45 Pa. St. 32 (1863); *Clark v. Continental Imp. Co.*, 57 Ind. 135 (1877). A person taking stock from a corporation on its original issue is liable without subscription. *Shickle v. Watts*, 94 Mo. 410 (1888). A person who receives a certificate of stock from a company in order to enable it to organize, and immediately transfers it back to the company is not liable on such stock as an offset to claims which he has as a creditor of the corporation. *Parberry v. Woodson Sheep Co.*, 18 Mont. 317 (1896).

² *Pittsburgh, etc. R. R. v. Gazzam*, 32 Pa. St. 340 (1858). In this case an attempt was made to make defendant liable upon his signature to a paper by which the signers agreed to subscribe for stock in a railroad company, but the signatures were shown to have been copies and not originals. *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188 (1878). The decision was on the question of fraud in inducing defendant to take the stock. *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341 (1827), holding that one who had subscribed a preliminary paper and had paid the sum required in advance, but who had not signed the contract referred to in an act of parliament, was not a subscriber within the meaning of that act.

Fanning v. Insurance Co., 37 Ohio St. 339 (1881), was a suit upon a note secured by a mortgage claimed to have been given in payment for stock.

The proof showed that defendant verbally agreed with a canvasser to take the stock, but did not sign any subscription book or other contract, and never received certificates of stock. *Held*, that there was no subscription and no sufficient consideration for the note.

Galveston Hotel v. Bolton, 46 Tex. 633 (1877). In this case defendant had signed an informal paper as a subscription for stock, and had offered excuses for not paying the first call, asking for time, etc. The informal paper was lost, and defendant's name did not appear on the company's books in any capacity. After the organization of the company he acknowledged to its secretary his obligation to pay the call. *Held*, that he was not a stockholder liable to calls.

The oral statement of the stockholder that he would take a certain amount of stock is not sufficient authority to a corporation to enter his name for that amount. *Ingersoll, etc. Co. v. McCarthy*, 16 Q. B. Rep. (Can.) 162 (1858).

In Iowa it is denied that parol subscriptions are void. Hence, where a person present at a corporate meeting directed the secretary to subscribe certain stock, and the secretary did so on a loose sheet of paper, the court held the subscriber bound; also that the corporate records reciting the facts were competent to show acceptance, though recorded subsequently. *Colfax Hotel Co. v. Lyon*, 69 Iowa, 683 (1886). A verbal subscription suffices. The statute of frauds does not apply. *Bullock v. Falmouth, etc. Co.*, 85 Ky. 184 (1887). A verbal subscription for stock was upheld in *Tabler v. Anglo-*

It has been held that, where a director is required to be a stockholder, the act of serving as a director is an implied subscription for stock to the amount required in order to be a director.¹ But a contrary rule now exists.²

A subscription in a small pocket memorandum book has been held sufficient to bind the subscriber.³ So, a subscription on a

American Assoc., 32 S. W. Rep. 602 (Ky., 1895); *Shellenberger v. Patterson*, 168 Pa. St. 30 (1895), and *York Park Bldg. Assoc. v. Barnes*, 39 Neb. 834 (1894). Where a person orally tells a director that he will subscribe a specified amount of stock, and gives a check in part payment, he is liable as a stockholder. *Cookney's Case*, 3 De G. & J. 170 (1858). And see also various cases in the notes herein, involving somewhat similar facts.

¹ See *Harward's Case*, L. R. 13 Eq. 30 (1871); *Stephenson's Case*, 45 L. J. (Ch.) 488 (1876); *Re British & A. Tel. Co.*, L. R. 14 Eq. 316 (1872); *Re Empire Ass. Corp.*, L. R. 6 Ch. App. 469 (1871).

Where one accepts the office of director without owning the required number of shares of stock, and is in consequence under obligation to qualify himself by taking stock, he is not obliged to take the stock from the company, but may purchase or procure the shares as he is able in the open market or at private sale. *Brown's Case*, L. R. 9 Ch. App. 102 (1873); *Karuth's Case*, L. R. 20 Eq. 506 (1875).

Where shares are allotted to a director in order to qualify him he is liable upon said shares upon the winding up, even though he did not know of the allotment, and even though he had acquired other qualification shares. *Re Portuguese, etc. Mines*, [1891] 3 Ch. 28.

² *Onslow's Case*, 55 L. T. Rep. 612 (1881), and cases cited. And see summary in *Healey's Company Law and Pr.* 135, 139. But a director is liable upon qualification shares upon a winding up of the company, even

though he has never held any shares, where the charter provides that serving as a director shall constitute a contract to pay for qualification shares. *Re Anglo-Austrian, etc. Union*, [1892] 2 Ch. 158.

The common-law rule that a director is not liable to the amount of qualification shares which he is required by statute to have, but which he does not have, is not applicable to directors in national banks. *Finn v. Brown*, 142 U. S. 56 (1891).

Hamley's Case, L. R. 5 Ch. D. 705 (1877), holds that a director who was not qualified did not by acting render himself liable to creditors to the amount of qualification stock. The court, in a *dictum*, said: "He never was a director, and he never will be a director, as far as that election is concerned," although of course his acts as director may bind the company as to third persons. See also *Ex parte Stock*, 33 L. J. (Ch.), 731 (1864).

Resignation releases the liability. *Re Self-Acting, etc. Co.*, 54 L. T. Rep. 676 (1886); *Marquis of Abercorn's Case*, 4 De G., F. & J. 78 (1862); *Re Wheal Buller Consols*, L. R. 38 Ch. D. 42 (1888). See also ch. XXXVII, *infra*.

"Can a director part with his qualification shares?" See on this subject 8 R'y & Corp. L. J. 99.

³ *Buffalo, etc. R. R. v. Gifford*, 87 N. Y. 294 (1882); *Brownlee v. Ohio, etc. R. R.*, 18 Ind. 68 (1862). *Contra*, *McClelland v. Whiteley*, 15 Fed. Rep. 322 (1883). The full christian name need not be subscribed. *State v. Beck*, 81 Ind. 501 (1882).

single sheet of paper may be binding,¹ even though the charter provides for the opening of books.² A signature to the certificate required by statute to be filed in order to obtain the charter of incorporation, with the number of shares placed opposite to the signature, is a sufficient subscription to bind both the corporation and the subscriber.³ But the assignee of a corporation cannot sue its incorporators for ten per cent of the capital stock on the ground that they had sworn that ten per cent had been paid in in order to obtain the charter, when in fact it had not been paid in.⁴

Where an "underwriter" agrees to subscribe for whatever the public do not take, and authorizes another to make the subscription for him, he is bound by the subscription.⁵

A company may give a person an option to subscribe for shares of stock in the company. If the company sells its assets before such option is exercised, the party holding the op-

¹ Iowa, etc. R. R. v. Perkins, 28 Iowa, 281 (1869); Hamilton, etc. Co. v. Rice, 7 Barb. 157 (1849). Cf. Bucher v. Dillsburg, etc. R. R., 76 Pa. St. 306 (1874); Hawley v. Upton, 102 U. S. 314 (1880).

² Mexican Gulf R'y v. Viavant, 6 Rob. (La.) 305 (1843); Ashtabula, etc. R. R. v. Smith, 15 Ohio St. 323 (1864).

³ Phoenix, etc. Co. v. Badger, 67 N. Y. 294 (1876); S. C., 6 Hun, 293; Nulton v. Clayton, 54 Iowa, 425 (1880); Herries v. Wesley, 13 Hun, 492 (1878).

Where the statute provides that the persons signing the articles of incorporation shall set opposite their names the amount of their subscription, a subscriber who complies therewith, but does not acknowledge the articles as required by the statute, is not bound by his subscription so far at least as the articles are concerned. Coppage v. Hutton, 124 Ind. 401 (1890). It is not necessary that the subscription be to the articles of incorporation. San Joaquin, etc. Co. v. Beecher, 101 Cal. 70 (1894). A failure to acknowledge the articles of incorporation is a good defense to a subscriber to them who is sued upon his sub-

scription. Greenbrier Ind. Exposition v. Rodas, 37 W. Va. 738 (1893).

⁴ Patterson v. Franklin, 176 Pa. St. 612 (1896).

⁵ Shaw v. Bentley, 68 L. T. Rep. 812 (1893); also *Re* Henry Bentley, 69 L. T. Rep. 204 (1893). An underwriters' agreement to subscribe if called upon so to do does not render them liable on a winding up if they were not so called upon. *Re* Harvey's Oyster Co., [1894] 2 Ch. 474. The offer of a party to take such stock as may not be taken by the public when offered for subscription may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re* Hemp, etc. Co., [1896] 2 Ch. 121. An underwriter's contract is given in full in *Re* Hannan's, etc. Co., [1896] 2 Ch. 643. An offer to underwrite such stock as is not subscribed for by the public must be accepted by the company prior to the offer to the public in order to be binding upon the person making the offer. *Re* Consort, etc. Mines, [1897] 1 Ch. 575.

tion may exercise it and sue for damages. The price at which the company sold its assets is the basis of the damage.¹

§ 53. *Informalities, irregularities and mistakes in subscriptions.*— But a subscription to an incomplete copy of the articles of association will not bind the subscriber;² and again, a subscription paper in which the names of directors were left blank has been held not enforceable against a subscriber after the blank has been filled without his consent or concurrence.³ Equity will not, however, in the absence of fraud, relieve a subscriber merely upon the ground that he by mistake subscribed for more stock than he intended, in a case where he suffered the corporation to act upon the faith of his subscription.⁴

¹ *Re South African, etc. Co.*, 74 L. T. Rep. 769 (1896); aff'd, 77 L. T. Rep. 377. Instead of subscribing for stock a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene. *Vent v. Duluth, etc. Co.*, 64 Minn. 307 (1896). In the case *Brown v. St. Paul, etc. Works*, 62 Minn. 90 (1895), an agreement of a corporation with a subscriber for stock to take back the stock at a certain time and refund the money if the subscriber so wished was upheld.

² *Dutchess, etc. R. R. v. Mabbett*, 58 N. Y. 397 (1874).

³ *Dutchess, etc. R. R. v. Mabbett*, 58 N. Y. 397 (1874), the court saying: "A signature to an incomplete paper, wanting in any substantial particular, when no delegation of authority is conferred to supply the defect, does not bind the signer without further assent on his part to the completion of the instrument." To same effect, *Consols Ins. Assoc. v. Newall*, 3 Fost. & F. 130 (1862), where the number of shares was left in blank. See also *Eakright v. Logansport, etc.*, 13 Ind. 404 (1859). In this case the

charter required that directors should be named in the articles of association. The adoption of the articles at the time of electing directors was held to be a substantial compliance with the charter, the requirement being considered as only directory.

But where an actual subscription is made, with a view of influencing other subscriptions, but the number of shares to be taken is left blank, so that the subscription itself might be subsequently withdrawn, it was held that the corporate agents might fill up the blank, and thereby bind the subscriber. *Jewell v. Rock River, etc. Co.*, 101 Ill. 57 (1881).

The case of *Clark v. Continental Imp. Co.*, 57 Ind. 135 (1877), held that an agreement to pay in instalments a certain sum to a contractor as the work progressed, in consideration of stocks to be delivered by the corporation, after full payment has been made in this way, was not a subscription to capital stock, and that the maker of such an agreement was not a subscriber.

⁴ *Diman v. Providence, etc. R. R.*, 5 R. I. 130 (1858). Where, with a view to organizing a corporation, various parties sign a subscription list on the oral agreement that they might change the amount of their subscriptions, and one who signed for \$5,000

But if one signs an agreement to subscribe, on a subscription paper, entirely misunderstanding the nature of the contract he is entering into, his subscription must, on general principles, be treated as null and void for want of mutual consent. Cases of this nature may arise without involving the question of fraud.¹

If the business of the incorporation is illegal, the subscription, of course, cannot be enforced.²

Many cases are given in the notes which will throw some light on the various principles of law as applicable to the facts in actions to collect subscriptions.³

notified the chief promoter that he wanted but \$2,500, and the corporation, when organized, made calls on him for only \$2,500, a corporate creditor cannot hold him for more. *White v. Kahn*, 103 Ala. 308 (1894).

¹*Jackson v. Hayner*, 12 Johns. 469 (1815); *Throughgood's Case*, 2 Coke, Rep. 9 (1584); *Foster v. Mackinnon*, L. R. 4 C. P. 704 (1869); *Rockford, etc. R. R. v. Schunick*, 65 Ill. 223 (1872),—not stock cases, but sustaining the general principle.

Reed v. Richmond Street R. R., 50 Ind. 342 (1875). In this case the statute authorizing the organization of street railway companies required that the articles of association should, among other things, state the number of directors and their names. Neither of these requirements was observed; and in an action to recover a subscription the court held the subscription void, saying: "If one of these requirements can be dispensed with, or held to be directory merely, we do not see where we are to stop. The case of *Eakright v. Logansport, etc. R. R.*, 13 Ind. 404 (1859), went as far in this direction as we are willing to go."

²See ch. XIII.

Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without con-

sideration and void. *Clemshire v. Boone County Bank*, 53 Ark. 512 (1890).

³*Boggs v. Olcott*, 40 Ill. 303 (1866), holding that the payment of calls by one whose name appears to a subscription to the stock of a corporation is an admission that his signature and subscription were authorized and binding upon him. To same effect is *Musgrave v. Morrison*, 54 Md. 161 (1880); *Rhey v. Ebensburg, etc. Co.*, 27 Pa. St. 261 (1856), in which a promise to subscribe for a certain amount of stock, for the purpose of inducing the company to adopt a certain route, was held enforceable, though no formal subscription ever was made; *Hawley v. Upton*, 102 U. S. 314 (1880), where the paper issued being a bond in consideration of shares received, but which were in fact never issued, the signer was held to be a stockholder. In *Cayuga Lake R. R. v. Kyle*, 64 N. Y. 185 (1876), where the articles of association were defective in not distinctly stating the termini of the road nor the counties through which it passed, it being held that such defect could not avail the defendant in an action for a balance of an unpaid subscription. *Gorissen's Case*, L. R. 8 Ch. App. 507 (1873), in which the person agreeing to place stock was held not liable as a stockholder. *Boston, etc. R. R. v. Welling-*

§ 54. *Various defenses to subscriptions.*—There are various defenses to the validity and enforceability of a subscription which have been treated of elsewhere. Thus, a subscriber to the capital stock of an incorporated company is, in general,

ton, 113 Mass. 79 (1873), in which the railroad was not divided into sections as contemplated by the subscription paper, the change, however, being a merely formal irregularity. In an old case in Massachusetts it was held that a statement, made at a public meeting of the corporation, by one of the stockholders, that he would spend half his estate, or enough of it to make the enterprise undertaken by the corporation a success, did not render him liable for a failure to do so. *Andover, etc. Corp. v. Hay*, 7 Mass. 102 (1810).

A subscription by various parties to a cheese factory to be incorporated, the number of shares being placed opposite the names, binds the subscribers only to the extent of the shares so placed opposite their names. *Davis, etc. Co. v. Jones*, 66 Fed. Rep. 124 (1895). A subscription contract prior to incorporation may be such that the subscribers are liable severally to the amount of their subscriptions. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471 (1896). A subscription prior to incorporation will not be construed as rendering each subscriber liable for the whole, even though the subscription speaks of a joint liability, it being clear that such was not the intent of the subscribers. *Chicago, etc. Co. v. Graham*, 78 Fed. Rep. 83 (1896). A subscriber who places opposite his signature the figures \$1,000 is bound, although he does not write the number of shares taken. *Columbus Land Co. v. McNally*, 172 Pa. St. 158 (1895). An agreement to buy stock was held to be a subscription to stock in *Lincoln, etc. Co. v. Sheldon*, 44 Neb. 279 (1895). An indefinite agreement to subscribe, run-

ning to trustees, is not enforceable, no corporate name, capital stock, or incorporators being named. *Loutsenhizer v. Farmers', etc. Co.*, 5 Colo. App. 479 (1895).

The validity of a subscription depends upon the law of the state creating the corporation, unless payment is to be made elsewhere. *Penobscot, etc. Co. v. Bartlett*, 78 Mass. 244 (1858).

Burlington, etc. R'y v. Palmer, 42 Iowa, 222 (1875), was an action upon a subscription note to a railroad, which, by agreement, was not to be delivered until a right of way had been secured, when a contract should be executed by the railroad to construct an extension upon certain conditions. *Held*, that the fact that the contract last referred to did not contain one of the conditions, which had, however, been complied with, did not constitute a defense to the action.

In *Lane v. Brainerd*, 30 Conn. 565 (1862), one who had subscribed in an irregular way, but had acted as a stockholder and accepted the office of director, was held to have waived all objection to the form of his subscription. To same effect, *Danbury, etc. R. R. v. Wilson*, 22 Conn. 435 (1853).

The fact that a subscription paper does not correctly designate the termini of a railroad already built is no defense to a subscriber. *Cayuga Lake R. R. v. Kyle*, 64 N. Y. 185 (1876). The legislature cannot make a person a subscriber in opposition to his will. *Richmond, etc. Assoc. v. Clarke*, 61 Me. 351 (1873).

One who never subscribes in writing for stock, nor assumes the position or rights of a stockholder, but

bound to know the legal effect of his subscription; and false and even fraudulent representations made to him at the time of taking his subscription, as to the legal effect of his contract

gives a bond to repay the subscription price, which is loaned to him, is not liable on the bond. *Butler University v. Scoonover*, 114 Ind. 381 (1888).

It is a question of fact and of contract whether a party loaned money to the company or was a subscriber to the stock. *McComb v. Barcelona, etc. Assoc.*, 134 N. Y. 598 (1892).

Where the corporation contracts with the subscriber to give him indefinite time in which to pay for his stock the subscription is void. *McComb v. Credit Mobilier, etc. Co.*, 13 Phila. 468 (1878); *Van Allen v. Illinois Cent. R. R.*, 7 Bosw. 515 (1861). It is otherwise when only a reasonable credit is given. *Mitchell v. Beckman*, 64 Cal. 117 (1883).

The fact that the subscriptions to various subscription lists of the same character are cut off from the headings and pasted under one heading does not release the subscribers. It is not a mutilation. *Sodus Bay, etc. R. R. v. Hamlin*, 24 Hun, 390 (1881).

Charlotte, etc. v. Blakely, 3 Strobb. (S. C.) 245 (1848). In this case one who subscribed a paper agreeing to take certain railroad stock "provided the road comes to Columbia," but did not sign the subscription books when opened, was held not to be a stockholder.

Erie, etc. R. R. v. Owen, 32 Barb. 616 (1860). In this case it is said that there are two modes in which a person, under the general railroad act of the state of New York, may become a stockholder in a railroad corporation, viz.: by subscribing the articles of association, and becoming a member of the corporation as the act provides (§§ 1 and 2), or by subscribing to the capital stock, in the book opened by the directors, after the

corporation is in existence; and that no one who has only signed the articles of association, before the corporation came into being, is a corporator or member of the corporation, unless the articles so signed by him have been duly filed in the office of the secretary of state, as required by the statute. It is doubtful whether this can be considered good law. This case is distinguished in *Buffalo, etc. R. R. v. Clark*, 22 Hun, 359, 362 (1880), and *Sodus, etc. R. R. v. Hamlin*, 24 Hun, 390, 394 (1881).

Although the statute provides for subscription books, yet a subscription on a subscription paper will be valid. *Ashtabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864); *Brownlee v. Ohio, etc. R. R.*, 18 Ind. 68 (1862); *Buffalo, etc. R. R. v. Gifford*, 87 N. Y. 294 (1882); *Hamilton, etc. Co. v. Rice*, 7 Barb. 157 (1849); *People v. Stockton, etc. R. R.*, 45 Cal. 306 (1873); *Stuart v. Valley R. R.*, 32 Gratt. 146 (1879). Especially where a loose sheet is subsequently put into a volume and made part of the records of the corporation. *Woodruff v. McDonald*, 33 Ark. 97 (1878).

Ex parte Besley, 2 Mac. & G. 176 (1850), in which the defendant was held to be a subscriber and liable to creditors of a railway, although he had not signed any subscription paper or book, but had attended meetings of the provisional committee as a member thereof, and had paid small assessments ordered by it.

Carlisle v. Saginaw, etc. R. R., 27 Mich. 315 (1873). Where the law required subscriptions to be made "in the manner to be provided by its by-laws," a subscription made before such by-laws were adopted was declared to be void.

New Brunswick, etc. Co. v. Mug-

of subscription, are not sufficient to release him.¹ Parol conditions or agreements in reference to subscriptions which are absolute on their face are generally not sustained.² Where the certificate of incorporation varies materially from the preliminary subscription agreement, the subscriber is released.³ The right of a stockholder to withdraw from his subscription is discussed elsewhere in this volume.⁴ And many other defenses which have been raised to defeat actions for the collection of subscriptions are considered elsewhere.⁵

§ 55. *Proof of subscription.*—It is presumptive evidence that one is a subscriber or stockholder when his name appears on the books of the company in either of these capacities.⁶ And

geridge, 4 Hurl. & N. 160 (1859). Defendant had agreed in writing to accept shares he desired to subscribe for, and had paid the sum required in advance, but he did not sign the articles of association subsequently sent to him for his signature. In an action for calls he was held not to be a shareholder, although his name had been placed as such upon the company's register. The decision rested upon a clause in the Joint-Stock Companies Act, 1856, to the effect that no person shall be deemed to have accepted any share unless his acceptance be in writing.

Tilsonburg, etc. Co. v. Goodrich, 8 Ont. 565 (1885), which was an action for calls on shares. "The defendant" (although one of the projectors and original subscribers) "was not a party to the petition, and he is not by the terms of the [general] statute a member of the company, and he has done nothing since the patent, by attending meetings or otherwise, which can have relation to his agreement to take stock." The court with regret held that he was not a stockholder.

¹ See § 196, *infra*.

² See ch. IX, *infra*. A defendant, it is said, however, who is sued on a subscription absolute, may show that he agreed orally to subscribe conditionally, and placed his name on blank

paper, and that the secretary of the corporation subsequently, without his knowledge, subscribed the name unconditionally to a subscription paper. See § 137, *infra*. And it is held that when a corporation invites and accepts subscriptions as a loan, to be repaid in full and the subscription canceled, it cannot repudiate such a contract and treat the subscription so induced as absolute. See § 247, n., *infra*. A party sued upon a subscription for stock may show that a letter accompanied the subscription to the effect that he would pay a certain part in cash, which had been done, and pay the balance out of his monthly accounts with the corporation. Elliott v. New York, etc. Co., 73 Hun, 519 (1893).

³ Greenbrier, etc. Exposition v. Rodes, 37 W. Va. 738 (1893). A change in the plan of organization so as to have a larger capital stock than was originally intended releases a subscriber. Norwich, etc. Co. v. Hockaday, 89 Va. 557 (1893).

⁴ See §§ 167-170, *infra*.

⁵ See ch. X.

⁶ Hoagland v. Bell, 36 Barb. 57 (1861); Turnbull v. Payson, 95 U. S. 418 (1877); Hamilton, etc. Co. v. Rice, 7 Barb. 157 (1849); Pittsburg, etc. R. R. v. Applegate, 21 W. Va. 172 (1882); Taylor v. Hughes, 2 Jones & Lat. (Ir. Ch.)

so also it is said that the commissioners' books are *prima facie* evidence of the subscriptions found in them,¹ and likewise as to the original subscription paper.² And again, entries in the proper books by commissioners duly appointed to take subscriptions are evidence against the subscribers.³ So corporate books to which a subscription has been transferred by authority of the subscriber are evidence of the subscription,⁴ and also the books that contain the original subscriptions.⁵

Entries on the stock ledger and corporate books are competent evidence of an issue of stock to a person.⁶ It has been

24, 55 (1844); *McHose v. Wheeler*, 45 Pa. St. 32 (1863). *Cf.* *Coffin v. Collins*, 17 Me. 440 (1840); *Whitman v. Granite Church*, 24 Me. 236 (1844); *Rockville, etc. Turnp. v. Van Ness*, 2 Cranch, C. C. 449 (1824); S. C., 20 Fed. Cas. 1080; *Mudgett v. Horrell*, 33 Cal. 25 (1867). Or when a certificate has been issued to him, which he produces. *Boardman v. Lake Shore, etc.* R. R., 84 N. Y. 157 (1881); *Agricultural Bank v. Burr*, 24 Me. 256 (1844); *Vanderwerken v. Glenn*, 85 Va. 9 (1888); *Lewis v. Glenn*, 84 Va. 947 (1888). The appearance of a person's name on the stock book of a corporation raises a presumption that he subscribed. *South Branch R'y v. Long's Adm'r*, 27 S. E. Rep. 297 (W. Va., 1897).

¹ *Rockville, etc. Co. v. Van Ness*, 2 Cranch, C. C. 449 (1824); S. C., 20 Fed. Cas. 1080; *Wood v. Coosa, etc.* R. R., 32 Ga. 273 (1861).

² *Partridge v. Badger*, 25 Barb. 146 (1857).

³ *Wood v. Coosa, etc. R. R.*, 32 Ga. 273 (1861).

⁴ *Iowa, etc. R. R. v. Perkins*, 28 Iowa, 281 (1869); *Hawley v. Upton*, 102 U. S. 314 (1880), a case where the party had no knowledge of the transfer, but was held liable. *Cf.* *Whitman v. Granite Church*, 24 Me. 236 (1844).

⁵ *Marlborough Branch R. R. v. Arnold*, 75 Mass. 159 (1858). *Cf.* *Mudgett v. Horrell*, 33 Cal. 25 (1867).

The subscription books are *prima facie* evidence of stockholdership. *Semple v. Glenn*, 91 Ala. 245 (1891).

In enforcing a subscription, stockholdership is proven by showing the name on the subscription list and proving payment of several assessments. *Glenn v. McAllister*, 46 Fed. Rep. 883 (1891).

The stock book and a subscription list are sufficient to prove stockholdership in the absence of rebuttal testimony. *Glenn v. Liggett*, 47 Fed. Rep. 472 (1891). But entries in the cash book are not admissible, nor the report of the treasurer of the corporation. *Glenn v. Liggett*, 47 Fed. Rep. 472 (1891).

Stockholdership may be proved by admissions of the stockholder and the testimony of the treasurer, and by the record book purporting to contain copies of the original minutes, where the stock book could not be found. *Congdon v. Winsor*, 17 R. I. 236 (1891).

⁶ *Chapman v. Porter*, 69 N. Y. 276 (1877). Where the name of an individual appears upon the stock book of a corporation as a stockholder, the presumption is that he is regularly and lawfully the holder and owner of the stock, and, in the absence of evidence that the stock has come to him by transfer, that he was regularly a subscriber. *Turnbull v. Payson*, 95 U. S. 418 (1877); *Pittsburgh, etc. R. R. v. Applegate*, 21 W. Va. 172

held, however, that entries in the books of a corporation showing the transfer of stock to a certain person, and payments by him thereon, are not *prima facie* evidence that he is a stockholder in a suit to charge him as a stockholder of the corporation.¹ The presumption that one is a stockholder, arising from the fact of his name being found in the stock and transfer book, may be met by proof to the contrary.² Creditors of a corporation are presumed to have relied upon the books as to who are stockholders.³ In order to let in secondary evidence of a subscription, there must be proof of an original subscription and of the loss of the book or paper, or the absence of the original paper satisfactorily accounted for.⁴ Various other

(1882); *McHose v. Wheeler*, 45 Pa. St. 32 (1863). If a person appears upon the books as a stockholder, the presumption is raised that he is a stockholder, and entries in the stock book are admissible to raise such presumption. *Holland v. Duluth, etc. Co.*, 68 N. W. Rep. 50 (Minn., 1896).

¹ *Carey v. Williams*, 79 Fed. Rep. 906 (1897), the court reviewing the authorities; also 88 *id.* 207.

² *Mudgett v. Horrell*, 33 Cal. 25 (1867). *Cf. Brewers', etc. Ins. Co. v. Burger*, 10 Hun, 56 (1877).

The stock books are sufficient to prove stockholdership if the name contained therein is the same as defendant's and was entered as his name. *Liggett v. Glenn*, 51 Fed. Rep. 381 (1892). *Cf. Howard v. Glenn*, 85 Ga. 238 (1890).

The books of the corporation are *prima facie* evidence of stockholdership. *Lehman v. Glenn*, 87 Ala. 618 (1889).

A mistake in entering the name of the subscriber on the corporate books may be fatal to proving stockholdership by the books. Where the subscription is denied, the best evidence is the subscription itself; and until it is accounted for, the stock ledger is inadmissible in evidence. If the action is on the written subscription, recovery can be on that

alone. *Taussig v. Glenn*, 51 Fed. Rep. 409 (1892).

Where there is no law authorizing a paper containing the subscriptions to the capital stock of a corporation to be filed in the office of the secretary of state, a copy thereof, certified under the seal of the secretary of state, is not admissible as evidence in a suit by the corporation to charge the defendant as stockholder. *Troy, etc. R. R. v. Kerr*, 17 Barb. 581, 600 (1854); *Tilsonburg, etc. Co. v. Goodrich*, 8 Ont. 565 (1885). *Cf. Bouchaud v. Dias*, 3 Denio, 238 (1846); *Dick v. Balch*, 8 Peters, 30 (1834).

A corporation may, by suit, compel its agents to deliver up subscription lists, or in lieu thereof be liable themselves on the subscriptions. *People's Brewing Co. v. Boebinger*, 40 La. Ann. 277 (1888).

³ *United States, etc. Co. v. Davies*, 2 Kan. App. 611 (1895). *Cf. Mudgett v. Horrell*, 33 Cal. 25 (1867).

⁴ *Pittsburgh, etc. R. R. v. Gazzam*, 32 Pa. St. 340 (1858); *Graff v. Pittsburgh, etc. R. R.*, 31 Pa. St. 489 (1858). See also *Hays v. Pittsburgh, etc. R. R.*, 38 Pa. St. 81 (1860).

Stockholdership may be proved by admissions of the stockholders and the testimony of the treasurer, and by the record book purporting to contain copies of the original minutes.

principles of evidence relative to proving one to be a subscriber are given in the notes below.¹

§ 56. *The English rule.*—In England the contract of subscription for shares is entered into in a somewhat more technical or formal manner. An application, in the first instance, is made in writing for a specified number of shares, which application is held to be a mere offer, open for acceptance by the corporation for only a limited time.² If the application be accepted, the corporation formally allots to the applicant the desired number of shares, and gives him a notice of the allotment.

if the stock book cannot be found. *Congdon v. Winsor*, 17 R. I. 236 (1891).

¹ See cases in notes to the preceding sections of this chapter; also the following cases:

Galveston Hotel Co. v. Bolton, 46 Tex. 633 (1877), where the original subscription paper was lost and the name of the defendant did not appear on the books of the company, and he had not paid the stipulated advance, nor participated in any action of the company, but had acknowledged verbally to the secretary his obligation to pay. *Held*, that the evidence was not sufficient to defeat the proof that he was a legal subscriber.

Pittsburgh, etc. R. R. v. Applegate, 21 W. Va. 172 (1882), where, in the absence of the subscription list, the company's stock book was held to be admissible in evidence as tending to show that defendants were stockholders. Citing cases.

Iowa, etc. R. R. v. Perkins, 28 Iowa, 281 (1869). Defendant attended a township meeting called to obtain subscriptions to a railroad company. The names of subscribers were written by the parties soliciting upon a slip of paper, being authorized to do so by the subscribers. The meeting then gave authority to an officer of the company to transcribe the subscriptions into the company's book. *Held*, that the book thus became the original contract of subscription, and

was admissible in evidence without proof of loss of the slip.

Haynes v. Brown, 36 N. H. 545 (1858). The absence of records being sufficiently accounted for to make parol evidence admissible, defendant's attendance at meetings of the corporation and his acting as president were accounted competent proof of his being a stockholder.

The corporate stock book, containing a list of the stockholders, the number of shares owned by each, the amounts paid and due, and containing defendant's name among others, is sufficient evidence of a balance due on unpaid subscription. *Glenn v. Orr*, 96 N. C. 413 (1887).

A contract between the defendant, who is sued as a stockholder, and his attorney, relative to defending the action, is inadmissible to prove stockholdership. *Liggett v. Glenn*, 51 Fed. Rep. 381 (1892); *Dorsheimer v. Glenn*, 51 Fed. Rep. 404 (1892).

² *Ramsgate, etc. Co. v. Montefiore*, L. R. 1 Exch. 109 (1866); *Re Bowron*, L. R. 5 Eq. 428 (1868), and the cases generally cited, *infra*, in this section.

A subscriber may withdraw before allotment by a legally convened meeting of the directors. *Re Portuguese, etc. Mines*, L. R. 42 Ch. D. 160 (1889). But not where the allotment is made irregularly before, but regularly confirmed after, the withdrawal. *Re Portuguese, etc. Mines*, L. R. 45 Ch. D. 16 (1890).

The notice is of the essence of the contract. An allotment without notice is not sufficient to bind the applicant as a contributory or a shareholder.¹ If the notice of allotment is sent by mail, the allottee becomes bound from the time of posting the letter, whether he received it or not.² And if the allottee knew of the fact of the allotment, and especially if he acted or suffered others to act upon the assumption that he was a shareholder, a formal notification may be unnecessary to bind him.³ The application being in the nature of an offer or a proposition may be withdrawn at any time before it has been regularly accepted, and it must be accepted within a reasonable time, or the party making it cannot be held bound;⁴ and although the application should be in writing, the withdrawal of it may be oral.⁵ It seems to be well settled in England, that, in order to make the contract to take up shares completely binding, there

¹ *Hebbs's Case*, L. R. 4 Eq. 9 (1867); *Gunn's Case*, L. R. 3 Ch. App. 40 (1867); *Re Peruvian R'ys Co.*, L. R. 4 Ch. App. 322 (1869); *Pellatt's Case*, L. R. 2 Ch. App. 527 (1867); *Ward's Case*, L. R. 10 Eq. 659 (1870); *Harris's Case*, L. R. 7 Ch. App. 587 (1872); *Household, etc. Co. v. Grant*, L. R. 4 Exch. D. 216 (1879). The mere act of signing the memorandum of association does not make one a stockholder. *Mackley's Case*, L. R. 1 Ch. D. 247 (1875). A mere allotment without an entry of the name on the stock registry does not render the person liable as a stockholder. *Nicol's Case*, L. R. 29 Ch. D. 421 (1885). Nor is one a stockholder unless he signs the deed of settlement. *Irish Peat Co. v. Phillips*, 1 Best & S. 598 (1861). Nor will a certificate be issued till then. *Wilkinson v. Anglo-Californian, etc. Co.*, 18 Q. B. 728 (1852).

Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally called meeting. *Re Portuguese, etc. Mines*, L. R. 45 Ch. D. 16 (1890).

² *Harris's Case*, L. R. 7 Ch. App. 587

(1872); *Household, etc. Co. v. Grant*, L. R. 4 Exch. D. 216 (1879); *Townsend's Case*, L. R. 13 Eq. 148 (1871). But see *Hebbs's Case*, L. R. 4 Eq. 9 (1867). *Contra*, *British, etc. Tel. Co. v. Colson*, L. R. 6 Exch. 108 (1871); *Re Constantinople, etc. Co.*, L. R. 11 Eq. 86 (1870). Where the party to whom the stock is allotted does not reply to the letter informing him of the allotment, he is not bound. *Re Staffordshire Gas, etc. Co.*, 66 L. T. Rep. 48 (1891).

³ *Levita's Case*, L. R. 3 Ch. App. 36 (1867); *Re Peruvian R'ys Co.*, L. R. 4 Ch. App. 322 (1869); *Richards v. Home, etc. Assoc.*, L. R. 6 C. P. 591 (1871).

⁴ *Ward's Case*, L. R. 10 Eq. 659 (1870); *Best's Case*, 2 De G., J. & S. 650 (1865); *Ramsgate, etc. Co. v. Montefiore*, L. R. 1 Exch. 109 (1866); *Chapman's Case*, L. R. 2 Eq. 567 (1866); *Ritso's Case*, L. R. 4 Ch. D. 774 (1877); *Wilson's Case*, 20 L. T. (N. S.) 962 (1869); *Pellatt's Case*, L. R. 2 Ch. App. 527 (1867).

⁵ *Wilson's Case*, 20 L. T. (N. S.) 962 (1869). An application for shares in a company may be verbally withdrawn before allotment. *Re Brewery Assets Corp.*, [1894] 3 Ch. 272.

must be the application in writing, the allotment of the shares to the applicant, and a communication to him of notice of the allotment.¹

§ 57. *Subscriptions taken by commissioners.*— Although the statute provides for subscription either by an original subscription to the articles of association, or, after the incorporation, by a subscription in books to be opened by commissioners, nevertheless it has been held that a subscription in some other way is binding.² The commissioners may themselves be subscribers to the stock,³ but they can have no priority of right to subscribe over others, and no subscriptions can lawfully be taken with

¹ Adams's Case, L. R. 13 Eq. 474 (1872); Hebbs's Case, L. R. 4 Eq. 9 (1867); Pellatt's Case, L. R. 2 Ch. App. 527 (1867); Roger's Case, L. R. 3 Ch. App. 633. 637 (1868); Tucker's Case, 41 L. J. Ch. 157 (1871). Cf. Bloxam's Case, 33 Beav. 529 (1864), distinguished in Pellatt's Case, *supra*. But under the Companies Act of 1862, § 23, the decisions are uniform that whenever one signs the memorandum of association he becomes a share-owner, and must be put on the list of contributors, although no shares may have been allotted to him. *Re London, etc. Co.*, L. R. 5 Ch. D. 525 (1877); Evans's Case, L. R. 2 Ch. App. 427 (1867); Sidney's Case, L. R. 13 Eq. 228 (1871); Levick's Case, 40 L. J. (Ch.) 180 (1870); Hall's Case, L. R. 5 Ch. App. 707 (1870), distinguishing Snell's Case, L. R. 5 Ch. App. 22 (1869). An allotment to a person who has not applied for shares is not binding. *Re Northern, etc. Co.*, 63 L. T. Rep. 369 (1890).

² Buffalo, etc. R. R. v. Gifford, 87 N. Y. 294 (1882); Stuart v. Valley R. R., 32 Gratt. (Va.) 146 (1879). *Contra*, Troy, etc. R. R. v. Tibbits, 18 Barb. 297 (1854); Parker v. Northern, etc. R. R., 33 Mich. 23 (1875); Unity Ins. Co. v. Cram, 43 N. H. 636 (1862); Shurtz v. Schoolcraft, etc. R. R., 9 Mich. 269 (1861). But when the statutes provide for commissioners, it is

said they must all be present in order to do legally the judicial duties assigned to them. Crocker v. Crane, 21 Wend. 211 (1839). It is said that in the taking of subscriptions the commissioners act ministerially, but in the distribution or allotment of shares they act judicially; and that a distribution of shares by commissioners not sufficient in number to constitute a legal board is void. Crocker v. Crane, 21 Wend. 211 (1839).

It has been held that the commissioners may limit the amount of stock which any one subscriber may take, and will, in a proper case, be sustained therein on grounds of public policy, although the power so to act is not specifically conferred upon them by the statute. Brower v. Passenger R'y, 3 Phila. 161 (1858). And accordingly fictitious subscriptions for the purpose of evading such a limitation of the amount of stock to be taken by a single subscriber are illegal and void. Perkins v. Savage, 15 Wend. 412 (1836). Commissioners to take subscriptions may refuse to allow one person to subscribe for half of the stock, and may refuse to accept a subscription from a person as trustee. Thomas v. Citizens', etc. R'y, 1 Am. St. R'y Dec. 299 (Pa., 1858).

³ Walker v. Devereaux, 4 Paige, 229 (1833).

closed doors. The books must be open, and the public must have an opportunity to subscribe.¹ The commissioners have only such general powers as are necessary to validate the subscriptions to the stock. Their authority and functions cease upon the organization of the corporation.²

§ 58. *Subscriptions in excess of the capital stock.*—In general, after the full amount of stock provided for in the act of incorporation has been subscribed, any further subscriptions are void.³ Where, by statute, the commissioners do not properly apportion stock, in cases involving an excess of subscriptions, an aggrieved subscriber may apply to a court of equity for relief.⁴

But, after the organization of the corporation, the duty to apportion the stock, if there has been an oversubscription, belongs to the corporation and not to the commissioners.⁵ And,

¹ *Brower v. Passenger R'y*, 3 Phila. 161 (1858). When the amount of the subscription is not limited, the commissioners, in the absence of other express provision, may usually decide when enough stock has been subscribed, and their decision is practically conclusive as an exercise of discretion. *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337, 348 (1872). Their failure to take the statutory oath will not invalidate the subscriptions taken by them, if they are in other essential respects regular. *Hollman v. Williamsport, etc. Co.*, 9 G. & J. (Md.) 462 (1838).

² *James v. Cincinnati, etc. R. R.*, 2 Disney (Cin. Super. Ct.), 261 (1858); *Peninsular R'y v. Duncan*, 28 Mich. 130 (1873); *Hardenburgh v. Farmers', etc. Bank*, 3 N. J. Eq. 68 (1834); *Walker v. Devereaux*, 4 Paige, 229 (1833); *Crocker v. Crane*, 21 Wend. 211 (1839); *Wellersburg, etc. Co. v. Hoffman*, 9 Md. 559 (1856); *Smith v. Bangs*, 15 Ill. 399 (1854); *State v. Lehre*, 7 Rich. L. (S. C.) 234 (1854).

The corporation may by suit set aside illegal subscriptions—the subscribers not being qualified. *Union Bank v. McDonough*, 5 La. 63 (1833).

³ *Lathrop v. Kneeland*, 46 Barb. 432 (1866); *Mackley's Case*, L. R. 1 Ch. D. 247 (1875).

⁴ *Walker v. Devereaux*, 4 Paige, 229 (1833); *Meads v. Walker*, Hopk. Ch. 587 (1825). *Cf. Haight v. Day*, 1 Johns. Ch. 18 (1814).

Where an apportionment is provided for in the event of an excess of subscriptions, it is said that the contract of subscription is not complete until the apportionment is made; that there can be neither stockholders nor corporation prior to the apportionment. *Walker v. Devereaux*, 4 Paige, 229 (1833); *Crocker v. Crane*, 21 Wend. 211 (1839); *Burrows v. Smith*, 10 N. Y. 550 (1853). *Cf. Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336, 346 (1856).

Where a resolution was passed by a board of directors, entitling a promoter to have a certain number of shares allotted to him, and the available shares had been disposed of before his bill for specific performance was filed, *held*, he had no ground for coming into equity. *Ferguson v. Wilson*, L. R. 2 Ch. App. 77, 87 (1866).

⁵ *State v. Lehre*, 7 Rich. L. (S. C.) 234 (1854), where an application for

in the absence of statutory authority, the commissioners, even before organization, have no general power, if they receive excessive subscriptions, to reduce proportionally all the subscriptions and apportion the stock. It is their only duty to take subscriptions up to the full amount of the prescribed capital, and to refuse anything beyond that.¹ Neither can the corporation, if it has issued the full amount of the stock, recover on subscriptions in excess. The subscriber acquires no title by such a subscription, and corporate creditors can enforce no liability thereon.² A subscriber for stock cannot be compelled to accept shares previously and lawfully issued to another subscriber.³ Where a person has subscribed for stock, but the corporation finds it has issued all of its stock, it cannot compel such subscriber to take preferred stock instead.⁴ If a corporation has already issued its entire stock to other parties, it cannot collect on a subscription made before such issue of the entire stock to other parties.⁵ It is no defense that the stock of a proposed corporation was oversubscribed.⁶

mandamus to compel commissioners to re-apportion stock agreeably to the charter of a company, and for *quo warranto* against officers claimed to have been illegally elected, was refused, the appellate court holding that the commissioners had no power to re-apportion stock after the subscribers had become a body corporate. In *Smith v. Bangs*, 15 Ill. 399 (1854), after the commissioners had closed the subscription books and called a meeting, at which directors were chosen, they reopened the books to receive further subscriptions. On the application of one of the directors they were restrained by injunction, the court holding that their powers were at an end.

¹ *Van Dyke v. Stout*, 8 N. J. Eq. 333 (1850).

² *Burrows v. Smith*, 10 N. Y. 550 (1853); *Oler v. Baltimore, etc. R. R.*, 41 Md. 583 (1874). See also § 192, *infra*. When the corporation has accepted subscriptions in excess of the capital stock, corporate officers cannot buy in shares of the stock at a discount.

and then re-issue them to provide for the oversubscription, charging the corporation par for the stock bought in, and thereby realizing a profit to themselves individually on the transaction. *East New York, etc. R. R. v. Elmore*, 5 Hun, 214 (1875). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber caused the contract with the contractor to be made. *Riverton Water Co. v. Hummel*, 175 Pa. St. 575 (1896).

³ *Knoxville, etc. R. R. v. Mayor*, 37 S. W. Rep. 883 (Tenn., 1896).

⁴ *Knoxville, etc. R. R. v. Mayor*, 37 S. W. Rep. 883 (Tenn., 1896).

⁵ *Level Land Co. v. Hayward*, 95 Wis. 109 (1896).

⁶ *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329 (1896).

§ 59. *Subscriptions and organization where there is a special charter and no commissioners are provided for.*—This subject is considered elsewhere.¹

§ 60. *Subscriptions delivered in escrow.*—Subscriptions for shares may be made and delivered in escrow to an agent of the corporation who is engaged in taking subscriptions,² or to a director of the corporation.³ But a delivery in escrow to a commissioner is bad, and a subscription so delivered is absolute.⁴ Delivery of a subscription in escrow, to become absolute on performance of certain conditions by the corporation, differs from a conditional subscription in this: that a subscription in escrow is, strictly speaking, no subscription. As in the case of a deed delivered in escrow, no estate passes until the second delivery. So, in the case of a subscription delivered in escrow, there is no subscription until a second delivery, and the depositary can only deliver it up on performance of the condition.⁵ So, also, a subscriber may show by parol an agreement with an agent of the corporation that his subscription to blank paper should not be a subscription until he had seen and approved the heading of the subscription paper.⁶

¹ See ch. XXXVI, *infra*.

² *Cass v. Pittsburg, etc. R'y*, 80 Pa. St. 31 (1875). It is a good defense, even as against a receiver, that the subscriber delivered the subscription to the canvasser to hold until the former investigated, and that he at once investigated and forbade the delivery of the subscription. *Great Western T. Co. v. Loewenthal*, 154 Ill. 261 (1894).

³ *Ottawa, etc. R. R. v. Hall*, 1 Ill. App. 612 (1878).

⁴ *Wight v. Shelby R. R.*, 16 B. Mon. (Ky.) 4 (1855). It is the rule in Kentucky that, to become effectual as an escrow, the delivery must be to a third person. *Wight v. Shelby R. R.*, *supra*. But in Pennsylvania it seems the rule is otherwise. *Cass v. Pittsburg, etc. R'y*, 80 Pa. St. 31 (1875). And so in Illinois. *Ottawa, etc. R. R. v. Hall*, 1 Bradw. (Ill.) 612 (1878). *Cf. Price v. Pittsburgh, etc. R. R.*, 34 Ill. 13, 36 (1864).

⁵ *Ottawa, etc. R. R. v. Hall*, 1 Bradw. (Ill.) 612 (1878). It is competent to show by parol that a subscription was delivered in escrow. The court of appeals of Illinois declares that a contrary rule is not sustained by any respectable authority. *Ottawa, etc. R. R. v. Hall*, 1 Bradw. (Ill.) 612 (1878). *Cf. Tonica, etc. R. R. v. Stein*, 21 Ill. 96 (1859). A subscription for stock may be delivered in escrow, and is not enforceable unless the conditions of such delivery are complied with. *Gilman v. Gross*, 72 N. W. Rep. 885 (Wis., 1897). A subscription to be delivered to the company in case the subscriber became a director is not enforceable if he was not made a director. *Turner's Case*, 7 Ont. Rep. (Can.) 448 (1884). An oral condition that the subscription list was not to be delivered except by the defendant's consent was upheld in *Davis v. Kueale*, 97 Mich. 72 (1893).

⁶ *Bucher v. Dillsburg, etc. R. R.*, 76

§ 61. *Liability of the corporation for refusal to issue a certificate of stock.*—The corporation is bound, upon demand, to deliver to a stockholder a certificate of stock representing his interest in the corporation.¹ If it refuses to issue the certificate the stockholder may bring suit in equity to compel its issuance,² or he may recover of the corporation in *assumpsit* the value of the shares at the time of the demand.³ Where a

Pa. St. 306 (1874). This, however, amounted to a parol condition—a subject fully treated in ch. IX, *infra*. A subscriber cannot defend against a note to pay the subscription on the ground that he delivered it to an agent of the corporation with instructions not to deliver it to the corporation until other stockholders gave similar notes. *Hardin v. Sweeney*, 14 Wash. 129 (1896).

¹ *Fletcher v. McGill*, 110 Ind. 395 (1887).

The stockholder is entitled to a certificate of stock. *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50 (1891).

A statute authorizing the issue of certificates of stock when it is fully paid up does not prevent the issue of such certificates before it is fully paid up. *Green v. Abietine Med. Co.*, 96 Cal. 322 (1899).

The subscriber for stock is not entitled to a certificate until he has paid for the stock in full. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893).

Where a prospective corporate officer issues certificates of stock in the prospective corporation, a person who loans money on such stock as collateral security may hold such officer liable for issuing the stock before the corporation was organized. *Merchants' Nat. Bank v. Robison*, 8 Utah, 256 (1892). The duty of the corporation to issue a certificate is considered also in §§ 192, 197, *infra*.

A subscriber for stock who has paid ten per cent cannot sue a consolidated company, into which his com-

pany has been merged, for a certificate, even though the articles of consolidation provide for the issue of one share of the latter company for every two shares of the old company, unless he has first demanded the certificate and has offered to pay the remaining ninety per cent, or asks for a certificate of stock not paid up. *Babcock v. Schuylkill, etc. R. R.*, 133 N. Y. 420 (1892).

² *Rowley's Appeal*, 115 Pa. St. 150 (1887). See also §§ 337, 338, *infra*. Cf. *Thorp v. Woodhull*, 1 Sandf. Ch. 411 (1844).

A corporation cannot be compelled by the subscriber for stock to issue a certificate therefor before it has been fully paid up, the stock being a part of the increased capital stock. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893).

If in organizing and issuing the stock the amount to be issued for the property is not what the contract calls for, the vendor may compel a specific performance. *Bailey v. Champlain, etc. Co.*, 77 Wis. 453 (1890). See also § 24, *supra*.

³ “A subscriber for shares of stock, in case the contract of subscription was regularly entered into, may, if the corporation refuse to issue him a certificate, have his action in equity for specific performance, or he may recover of the corporation, in *assumpsit*, the value of the shares at the time of the demand.” *Birmingham Nat. Bank v. Roden*, 97 Ala. 404 (1892), quoting the text.

Wyman v. American Powder Co.,

corporation refuses to issue the stock to a subscriber, he may file a bill in the alternative to compel the issue of the shares or the payment of their value with damages.¹ A subscriber to the increased capital stock who has actually paid part of the price cannot recover back the money upon the corporate insolvency on the ground that no certificate was issued.²

The fact that the corporation has not issued a certificate to a stockholder for thirty years, and that he has not insisted on his right as such, is no bar to his suit to establish his stockholdership.³

In case the full capital stock has been issued, then, of course, specific performance of an agreement to issue more shares cannot be had.⁴ The liability of a corporation to issue stock to the

62 Mass. 168 (1851); *Chester Glass Co. v. Dewey*, 16 Mass. 94 (1819). But to entitle one to recover back money advanced to a corporation for shares, upon the ground of a failure to issue the certificate, the subscriber must, before suit, rescind the contract and demand the money. *Swazey v. Choate Mfg. Co.*, 48 N. H. 200 (1868). See also *Pacific Nat. Bank v. Eaton*, 141 U. S. 227 (1891).

¹ And if, during the pendency of the suit, the company becomes insolvent, the court can give him damages payable *pro rata* out of the assets of the corporation. *Re Reading Iron Works*, 149 Pa. St. 182 (1892).

In an action by a subscriber for stock to compel the corporation to deliver stock, the directors are proper but not necessary parties. *Wells v. Green Bay, etc. Co.*, 90 Wis. 442 (1895).

² *Pacific Nat. Bank v. Eaton*, 141 U. S. 227 (1891); *Thayer v. Butler*, 141 U. S. 234 (1891); *Butler v. Eaton*, 141 U. S. 240 (1891).

³ *Bedford County v. Nashville, etc. R'y*, 14 Lea (Tenn.), 525 (1884); *Kobogum v. Jackson Iron Co.*, 76 Mich. 498 (1889).

⁴ *Finley, etc. Co. v. Kurtz*, 34 Mich. 89 (1876); *Ferguson v. Wilson*, L. R. 2 Ch. App. 77 (1866). Where a bank contracted to give a person a certain

amount of stock if he would do business with it, and he did so, the bank is liable in damages for refusal to deliver the stock. *Rich v. State Nat. Bank*, 7 Neb. 201 (1878). For the refusal of the corporation to issue original stock to a subscriber, the measure of damages is the difference between the price contracted for and the market value on the day when the issue ought to have been made. *Van Allen v. Illinois Cent. R. R.*, 7 Bosw. 515 (1861). For another rule as to the measure of damages, and one more in favor of the plaintiff, see *Baltimore, etc. R'y v. Sewell*, 35 Md. 238 (1872); and also ch. XXXV, *infra*. In Louisiana the universal legatee may pay for, and demand, the certificate of stock subscribed for by his ancestor. The executor has no power to cancel the subscription, and the stock cannot be appropriated by a subsequent subscriber, who subscribed for it by consent of the executor. *State v. Crescent City, etc. Co.*, 24 La. Ann. 318 (1872). *Cf. Wallace v. Townsend*, 43 Ohio St. 537 (1885). If a mistake has been made by which the certificates and stock have been issued to the wrong person, a court of equity will remedy it. *O'Meara v. North American Min. Co.*, 2 Nev. 113 (1866).

subscribers thereof does not necessarily devolve upon another corporation which succeeds to its debts, liabilities, and franchises.¹

§ 62. *Substitution of stockholders before the incorporation — Change in the proposed enterprise — Alteration of the subscription paper.*— There has been some controversy as to the legality of one person being substituted for another as a subscriber before the incorporation and issue of the stock. If the facts are such that a cancellation of the subscription is legal, then doubtless the substitution is legal.² But where such is not the case, then it would seem that the substitution is merely a transfer of the stock, and the transferrer, in that case, should be held liable, but only to the same extent as in other cases of transfer of stock.³

In California it is held that no substitution of stockholders is legal; but the weight of authority clearly sustains a contrary rule.⁴ If the vendor afterwards obtains the certificates and sells them again to others, he is liable to the first person to whom he sold his interest,⁵ and is liable also to the latter if the corporation is never formed.⁶ If the corporation is duly formed, the

¹ *Conant v. National Ice Co.*, 40 N. Y. Super. Ct. 83 (1875).

In England it seems that directors are not individually liable to subscribers for the breach by the corporation of its agreement to issue stock. *Ferguson v. Wilson*, L. R. 2 Ch. App. 77 (1866). But see also *Swift v. Jewsbury*, L. R. 9 Q. B. 301 (1874); *Betts v. De Vitre*, L. R. 3 Ch. 429, 441 (1868); *Henderson v. Lacon*, L. R. 5 Eq. 249 (1867); *Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693 (1876).

² See §§ 167-170, *infra*, on cancellation. See also *Burke v. Smith*, 16 Wall. 390 (1872), and *dictum* in *Ryder v. Alton*, etc. R. R., 13 Ill. 516, 521 (1851). *Cf.* *Selma, etc. R. R. v. Tipton*, 5 Ala. 787 (1843), to the effect that a subscriber cannot withdraw.

³ See ch. XV.

⁴ *Baltimore, etc. R'y v. Sewell*, 35 Md. 238 (1872); *Tempest v. Kilner*, 3 C. B. 249 (1846); *Hunt v. Gunn*, 13 C. B. (N. S.) 226 (1862); *Merrimac Min.*

Co. v. Levy, 54 Pa. St. 227 (1867). *Contra*, *Hawkins v. Mansfield, etc. Co.*, 52 Cal. 513 (1877); *Morrison v. Gold Mountain, etc. Co.*, 52 Cal. 306 (1877); *Coleman v. Spencer*, 5 Blackf. (Ind.) 197 (1839). See also *Chater v. San Francisco, etc. Co.*, 19 Cal. 219 (1861).

A substitution of stockholders after organization by canceling some subscriptions and filling in others is illegal. There should be a transfer. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890).

An alteration of a subscription list by a subscription being changed and another name substituted releases other subscribers who signed before the alteration. *Texas Printing, etc. Co. v. Smith*, 14 S. W. Rep. 1074 (Tex., 1889). See also on this subject, § 169 and § 50.

⁵ *Beckitt v. Bilbrough*, 8 Hare, 188 (1850).

⁶ *Kempson v. Saunders*, 4 Bing. 5 (1826). But the latter is not liable to

vendor may compel the vendee to pay for the subscription transferred, and may collect a note given in payment.¹

A material change in the character of the enterprise, the capital stock, or purpose of the proposed company releases those who do not assent thereto.²

Where articles are materially altered without the consent of all the subscribers, after their subscription and before the complete organization of the company, such articles are not binding upon the non-consenting subscribers.³ But it is no defense that the subscriptions of other parties were erased and that such parties were released by the board of directors.⁴ A subscription to be paid for when the directors find other parties who will agree to purchase the stock from the subscriber is illegal as an attempt to release a subscriber.⁵ The mere erasure of a subscription will not of itself prevent a recovery upon it.⁶

take the shares nor to indemnify his vendor even if the company is formed. *Jackson v. Cocker*, 4 Beav. 59 (1841).

¹ *Mahan v. Wood*, 44 Cal. 462 (1872).

² See § 502, *infra*.

³ *Burrows v. Smith*, 10 N. Y. 550 (1853); *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557 (1893); *Greenbrier Ind. Exposition v. Rodes*, 37 W. Va. 738 (1893). An alteration in the subscription articles is no defense unless fraudulently made or to the injury of defendant. *Armstrong v. Danahy*, 75 Hun, 405 (1894). See also § 197, *infra*.

An alteration of a subscription list by a subscription being changed and another name substituted releases other subscribers who signed before the alteration. *Texas Printing, etc. Co. v. Smith*, 14 S. W. Rep. 1074 (Tex., 1889).

A change in the subscription by several of the subscribers, but not increasing the liability of the others, does not release the others. An increase in the capital upon incorporation does not release. *Gibbons v. Grinsell*, 79 Wis. 365 (1891).

⁴ *Bristol, etc. Co. v. Selliez*, 175 Pa. St. 18 (1896).

⁵ *McNulta v. Corn, etc. Bank*, 164 Ill. 427 (1897).

⁶ *Johnson v. Wabash, etc. Co.*, 16 Ind. 389 (1861). And where one took a book for subscriptions from an agent of the corporation, and subscribed himself and persuaded others to subscribe, and kept the book some months, but finally, because of a difference with the agent about the payment for his services, cut his name out of the book and returned it to the company, it was held, in an action by the company for the amount of his subscription, that he was bound thereon just as though he had left his name on the list of subscribers. *Greer v. Chartiers R'y*, 96 Pa. St. 391 (1880); *Railroad Co. v. White*, 10 S. C. 155 (1878).

It has been held, however, in New York, that where the statutory certificate required by law to be filed in order to obtain incorporation remains in the hands of a subscriber, a subscriber may erase or modify his subscription as he sees fit, even though he had previously induced others to subscribe. *Burt v. Farrar*, 24 Barb. 518 (1857).

A stockholder who erases his sig-

§ 63. *Right to recover back money advanced on shares upon a failure to organize the company.*—Where one has advanced money in good faith to the promoters of a company, as a deposit or assessment upon shares subscribed for to be subsequently issued, and the enterprise contemplated by the proposed incorporation is abandoned, or the company for any reason fails to be incorporated, such subscriber may recover back the money so advanced.¹ Nor is he obliged to submit to the deduction of any part thereof to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.²

B. WHO IS COMPETENT TO SUBSCRIBE FOR STOCK.

§ 64. *Corporations generally not.*—Upon general common-law principles any one who is competent to enter into ordinary contracts may make a valid subscription for stock in an incorporated company. A subscription for stock is a contract; and, in general, any one who can contract may subscribe. The corporation itself, however, cannot be a subscriber to its own stock.³ Municipal corporations may lawfully subscribe for the

nature from a subscription list without authority cannot, as a corporate creditor, enforce such subscription list against other stockholders, he having illegally altered the agreement. *Jackson v. Cherokee Medicine Co.*, 47 S. C. 215 (1896).

¹ *Nockels v. Crosby*, 3 Barn. & C. 814 (1825); *Ward v. Londesborough*, 12 C. B. 252 (1852); *Ashpitel v. Sercombe*, 5 Exch. 147 (1850); *Williams v. Salmond*, 2 Kay & J. 463 (1856); *Chaplin v. Clarke*, 4 Exch. 403 (1849). *Cf. Vollans v. Fletcher*, 1 Exch. 20 (1847); *Grand Trunk, etc. R'y v. Brodie*, 9 Hare, 823 (1852); *Kemson v. Saunders*, 4 Bing. 5 (1826), where a vendee recovered from his vendor money paid for stock in a company which was never organized. And see also *Williams v. Page*, 24 Beav. 654 (1857). "A bill in equity lies to recover back money paid on a "bubble." *Colt v. Woollaston*, 2 P. Wms.

154 (1723); *Green v. Barrett*, 1 Sim. 45 (1826). See also the "Bubble Act," 6 Geo. I., ch. 18; also § 705, etc., *infra*.

Where a subscriber for stock pays for the stock before the company is organized, he may recover back the money if the company is not organized. *Bradford v. Harris*, 77 Md. 153 (1893).

Where promoters agree to sell stock in a proposed corporation upon a tender of the price by a certain day, such tender need not be made if the company is not organized. The proposed purchaser may recover back the consideration. *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490 (1892).

² *Nockels v. Crosby*, 3 Barn. & C. 814 (1825). But see, *contra*, *Williams v. Salmond*, 2 Kay & J. 463 (1856); *Ashpitel v. Sercombe*, 5 Exch. 147 (1850).

³ Thus, where a number of individuals attempted to organize a corpo-

stock of private corporations, when authorized by statute to do so.¹ Where a municipality has subscribed for stock illegally, any other stockholder may bring suit to have the subscription canceled.² It is not equally clear that one private corporation may subscribe for the stock in another such corporation. On the contrary, such subscriptions are *ultra vires* and void unless clearly within the ordinary objects and business of the subscribing corporation. A bank cannot lawfully subscribe for stock in a railroad corporation.³ A railroad corporation cannot sub-

scription with a capital stock of 72,500 shares, of the par value of \$100 each, and six different persons subscribe for one share each, and one person then subscribes for the corporation as follows: "Oregon Central Railroad Company, by G. L. Woods, Chairman, seventy thousand shares, seven million dollars," it was held that this subscription was void, and that the corporation could not be created by such subscriptions. *Holladay v. Elliott*, 8 Oreg. 84 (1879). See also § 251, *infra*. And again it has been held that where the directors of a company, in order to make up the required amount of capital stock, subscribed as trustees for the corporation itself, they are liable for calls on the amount so subscribed. In the same case a bill by a member of the corporation on behalf of himself and all the other members except the defendants, praying that this transaction, although it had been sanctioned unanimously at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members, on behalf of whom the bill was filed, had been present and voted at that meeting. *Preston v. Grand Collier Dock Co.*, 11 Sim. 327 (1840).

Where the unissued stock of a company (upon its reorganization on the expiration of its charter) is issued to the president as trustee to sell from time to time and to turn over the proceeds of the sales to the company,

the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. *Neptune v. Paxton*, 15 Ind. App. 284 (1896).

Stockholders cannot defeat their liability on stock by setting up that they subscribed in behalf of the corporation itself, and on the secret agreement that they should not be held liable. *Barto v. Nix*, 15 Wash. 563 (1896); *Denny Hotel Co. v. Schram*, 6 Wash. 134 (1893).

In *Allibone v. Hager*, 46 Pa. St. 48 (1863), the court held it no defense to an action by a creditor of a corporation that defendants had subscribed for stock in their own names, but really as agents for the corporation itself.

¹*Sharpless v. Mayor, etc.*, 21 Pa. St. 147 (1853), and the long train of decisions following. The matter of municipal subscriptions is fully considered in chapter VI.

²*Stebbins v. Perry County*, 167 Ill. 567 (1897).

³*Nassau Bank v. Jones*, 95 N. Y. 115 (1884), holding that the bank could not recover the profits on such subscription which was made in the name of its agent; nor for stock in any other corporation, the business of which is wholly other than banking. *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43 (1877); *Mechanics', etc. Bank v. Meriden Agency Co.*, 24 Conn. 159 (1855); *Talmage v. Pell*, 7

scribe for shares of stock in another railroad company;¹ nor can a dry-dock company be held liable upon a subscription for stock in a steamship company;² nor can a manufacturing company legally subscribe to the stock of a bank for the purpose of carrying on the banking business.³ A fire insurance company has no power to subscribe for stock in a projected bank, not yet organized, even though the statute gives it power to invest in stocks.⁴ A furniture manufacturing company is not liable on a statutory liability on stock which it has subscribed and paid for in a hotel company.⁵ All such contracts are, in general, *ultra vires* and not enforceable.⁶ A construction company, however, is presumed to have power to subscribe for the stock of a railroad which it is building.⁷ A railroad company has no power to donate its funds to a fair.⁸ A hotel company may subscribe to a military encampment enterprise.⁹ It is no defense to an action on a subscription that a part of the subscriptions were made by corporations and were not enforceable. Only the state can raise that objection.¹⁰

§ 65. *Commissioners, directors, partners, etc., as subscribers.* Commissioners may be subscribers to the capital stock.¹¹ So,

N. Y. 328 (1852). Cf. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122 (1875); and see *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869); *Joint-stock Disct. Co. v. Brown*, L. R. 8 Eq. 381 (1869); *Berry v. Yates*, 24 Barb. 199 (1857), holding that one insurance company cannot subscribe to another. For a failure of proof to show that a corporation was a subscriber for stock, see *McMillan v. Carson Hill, etc. Co.*, 12 Phila. 404 (1878). An owner of land cannot defeat its condemnation by showing that a corporation subscribed to part of the capital of the corporation seeking to obtain the land. *Re Rochester, etc. R. R.*, 110 N. Y. 119 (1888); *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880). See also §§ 315-317, *infra*.

¹ *Maunsell v. Midland, etc. R'y*, 1 Hem. & M. 130 (1863). One railroad company has no implied power to subscribe to the capital of another, and cannot do so indirectly by hav-

ing individuals subscribe and then indemnifying the individuals. *Logan v. Courtown*, 13 Beav. 22 (1850); and see ch. XIX.

² *New Orleans, etc. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173 (1876).

³ *Sumner v. Marcy*, 3 Woodh. & M. 105 (1847); S. C., 23 Fed. Cas. 384.

⁴ *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1 (1892).

⁵ *Knowles v. Sandercock*, 107 Cal. 629 (1895). See ch. XIV on this subject.

⁶ See Part IV, on *ultra vires* contracts in general.

⁷ *Re Rochester, etc. R'y*, 45 Hun, 126 (1887).

⁸ See §§ 681, 775, 909, *infra*.

⁹ *Richelieu Hotel Co. v. International, etc. Co.*, 140 Ill. 248 (1892).

¹⁰ *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58 (1895).

¹¹ *Walker v. Devereaux*, 4 Paige, 229 (1833).

also, may directors and corporate officers subscribe; and it has been held that a director, in the absence of fraud or fraudulent intent, may subscribe for the whole of the unsubscribed stock in his own name and for his own benefit.¹ But a stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquire control of the company.² A partner, if the act be within the scope of the partnership business, may bind his firm by a subscription in the firm name.³ But if it is not within the scope of the partnership business, the person so signing is liable personally; and whether or not the subscription was within the scope of the partnership business may be a question for the jury.⁴

§ 66. *Married women as subscribers.*—At common law a married woman could not subscribe for stock, and any person subscribing in her name was himself personally liable on the

¹ *Sims v. Street R. R.*, 37 Ohio St. 556 (1882). But see §§ 70, 286, 615, 653. But neither the commissioners (*Brower v. Passenger R'y*, 3 Phila. 161—1858), nor any original stockholder (*Curry v. Scott*, 54 Pa. St. 270—1867), have any priority of right over the other subscribers, or the public generally, in the matter of subscription for stock.

² *Morris v. Stevens*, 178 Pa. St. 563 (1897). Where the stockholders are present and only one objects to the issue of unissued stock to a director, whereby he acquires control, such issue is legal. *Christopher v. Noxon*, 4 Ont. Rep. (Can.) 672 (1883). In *Re London, etc., Ltd.*, 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of £10 each and twelve thousand ordinary shares of £10 each. The founders' shares were entitled to half of any dividend which might remain after paying ten per cent on the ordinary shares. The directors allotted to themselves eighty of these founders' shares, and the court upheld the allotment. The

prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others.

³ *Maltby v. Northwestern, etc. R. R.*, 16 Md. 422 (1860); *Ogdensburgh, etc. R. R. v. Frost*, 21 Barb. 541 (1856); *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880). Otherwise if not within the partnership business. *Livingston v. Pittsburgh, etc. R. R.*, 2 Grant's Cas. (Pa.) 219 (1858). Where partners are stockholders, and all stockholders join in sureties to notes to aid the corporation, one partner may bind the firm by signing its name also as surety. *Morse v. Hagenah*, 68 Wis. 603 (1887). A member of a mercantile firm cannot bind the firm by a subscription to the capital stock of a milling corporation. *Patty v. Hillsboro, etc. Co.*, 4 Tex. Civ. App. 224 (1893).

⁴ *Morse v. Hagenah*, 68 Wis. 603 (1887).

subscription.¹ But now, in England, and generally in the United States by statute, a married woman may bind her separate estate by such subscription;² and when it appears that the contract was with the wife, having been made directly and solely with her, the husband is not bound.³ The recourse of the corporation or the corporate creditors is, in such a case, to her separate estate only.⁴

In England a husband has been held liable on his wife's subscription to the capital stock of an incorporated company, the subscription having been made before marriage.⁵

¹ Pugh & Sharman's Case, L. R. 13 Eq. 566 (1872).

² Witters v. Sowles, 32 Fed. Rep. 767 (1887); Matthewman's Case, L. R. 3 Eq. 781 (1866); Luard's Case, 1 De G., F. & J. 533 (1860); Butler v. Cumpston, L. R. 6 Eq. 16 (1868); *Re Reciprocity Bank*, 22 N. Y. 9 (1860). See §§ 250, 319, *infra*.

³ Angas's Case, 1 De G. & Sm. 560 (1849); Dalton v. Midland, etc. R'y, 13 C. B. 474 (1853); Ness v. Angas, 3 Exch. 805 (1849). See also Luard's Case, 1 De G., F. & J. 533 (1860).

⁴ Biggart v. City of Glasgow Bank, 6 Scotch Ct. of Sess. Cas. (4th ser.) 470 (1879); Matthewman's Case, L. R. 3 Eq. 781 (1866).

⁵ Burlinson's Case, 3 De G. & Sm. 18 (1849), where the husband was held liable, although he had not fulfilled the conditions of the deed of settlement entitling him to become a member, but had only received dividends on the wife's shares.

Luard's Case, 1 De G., F. & J. 533 (1860), holding that where a woman, being a registered owner of stocks before marriage, attempted to deed them in trust so as to exclude the husband, but the trustees did not accept, and they continued in her name until the liquidation of the company, the husband should be placed with the wife on the list of contributories.

White's Case, 3 De G. & Sm. 157 (1850), was decided on special facts

under the terms of a deed of settlement which regulated the rights of the husband and wife to shares in her name. In this case a restricted liability for a limited time was imposed upon the husband, he having done some acts in relation to the shares, but not sufficient to constitute an entire acceptance.

Sadler's Case, 3 De G. & Sm. 36 (1849), holding the husband liable when the shares came to the wife by legacy before marriage, although neither she nor the husband paid the covenanted calls, received any dividends, or otherwise acted as members.

Kluht's Case, 3 De G. & Sm. 210 (1850), where the husband was held liable for losses during, but not for losses before and after, the coverture. He had not complied with necessary preliminaries for becoming a member, although he had done some acts in relation to the shares of the wife.

A husband is liable upon a legacy of stock to the wife during coverture, where it appeared that the stock had been transferred to her, and the transfer duly accepted by her and her husband, and that she only had signed the dividend warrants and drawn the dividends, the proceeds being applied to ordinary household expenses. Thomas v. City of Glasgow Bank, 6 Scotch Ct. of Sess. Cas. (4th ser.) 607 (1879).

§ 67. *Infant as subscriber.*—A subscription for stock by an infant is a contract to be governed by the general rules of law that apply to the contracts of infants generally. In general, the subscriptions of infants are voidable rather than void. He may repudiate it at majority, and thereby entirely escape liability; or he may ratify it, and thereby become as fully bound as though the subscription had been made after majority.¹ Accordingly it is a settled rule that, where one subscribes for shares in the name of an infant, he is liable personally to the corporation or the corporate creditors on the subscription.² An

¹ Lumsden's Case, L. R. 4 Ch. App. 31 (1863), where an infant transferred shares after coming of age, and did not attempt to repudiate his remaining shares until four months after the winding-up order, being nine months after his majority. He was held to have affirmed his holding.

Ebbett's Case, L. R. 5 Ch. App. 302 (1870), where a holding for fourteen months after majority without repudiating the shares was held to be an acquiescence, though the shareholder had never acted as such.

Baker's Case, L. R. 7 Ch. App. 115 (1871), where a company was in process of being wound up, when an infant, holding shares as trustee, attained his majority, and he promptly repudiated the shares when the notice of a call was sent him four months afterwards. Subsequently he, by letter, authorized the official liquidator to use his name in proceedings against the *cestui que trust*. Held, that by the letter he had not retracted his repudiation of the shares.

In Mitchell's Case, L. R. 9 Eq. 363 (1870), an infant holding shares as trustee, who took no steps to repudiate them for two years after coming of age, was held to be a contributory.

In Wilson's Case, L. R. 8 Eq. 240 (1869), an infant holding shares in a bank, who came of age after the winding-up order was made, was held not to be a contributory, though

he had made no formal repudiation, but had not done any act of acquiescence, except that his solicitors, acting for him and others, had opposed an order for a call.

In Hart's Case, L. R. 6 Eq. 512 (1868), where notice of intention to put the name of a female infant upon the list of contributories of a corporation in process of being wound up was served during infancy, and more than two years after her majority a summons for a call was made, when she applied to have her name removed from the list, it was held she was not precluded by the delay.

In Pim's Case, 3 De G. & Sm. 11 (1849), where a son, who, after the death of his father, discovered that shares had been taken in his own name, was held not to be a contributory, although, at the request of an officer of the company, he had surrendered the shares for exchange for others.

See §§ 250, 318, *infra*.

² Weston's Case, L. R. 5 Ch. App. 614 (1870); Richardson's Case, L. R. 19 Eq. 588 (1875); Reaveley's Case, 1 De G. & Sm. 550 (1848); Reid's Case, 24 Beav. 318 (1857); *Ex parte Reaveley*, 1 Hall & Tw. 118 (1849). So also a person is liable who transfers stock to an infant. Capper's Case, L. R. 3 Ch. App. 458 (1868); Castello's Case, L. R. 8 Eq. 504 (1869); Symons's Case, L. R. 5 Ch. App. 298 (1870); Curtis's Case, L. R. 6 Eq. 455 (1868).

infant's subscription must be repudiated within a reasonable time after coming of age or he will be held to have ratified it.¹

§ 68. *Subscription by agent.*—A valid subscription may, of course, be made through an agent.² Where a person subscribes

¹Dublin, etc. *R'y v. Black*, 7 Railw. & Can. Cas. 434 (1852); S. C., 8 Exch. 181. Infancy is a personal defense. *Beardsley v. Hotchkiss*, 96 N. Y. 201 (1884). Where an infant allows his name to remain on the register after he becomes of age, he thereby ratifies his subscription. *Cork, etc. R'y v. Cazenove*, 10 Q. B. 935 (1847). A court will not presume that an infant subscriber has avoided his contract; and hence a defense of infancy, in an action on a subscription, without an allegation of avoidance, is ineffectual, and the plaintiff may have judgment. *Leeds, etc. R'y v. Fearnley*, 4 Exch. 26 (1849). But it has been held that repudiation before coming of age avoids the contract of subscription *ab initio*; and hence a plea of infancy and of repudiation while an infant, and of notice to the company that the stock was at their disposal, is a good defense to an action on a subscription. *Newry, etc. R'y v. Coombe*, 3 Exch. 565 (1849). See also *Parsons's Case*, L. R. 8 Eq. 656 (1869).

²*Musgrave v. Morrison*, 54 Md. 161 (1880); *Burr v. Wilcox*, 22 N. Y. 551 (1860); *Rhey v. Ebensburg, etc. Co.*, 27 Pa. St. 261 (1856); *Re New York, etc. R'y*, 35 Hun, 220 (1885); *Re Whitely Partners*, L. R. 32 Ch. D. 337 (1886). Where bonds are purchased by one for several, they are liable to contribute therefor. *Musgrave v. Buckley*, 114 N. Y. 506 (1889).

If both the principal and agent are incorporators, and the agent subscribes in his own name, the principal cannot claim the stock, inasmuch as he has sworn in the articles of incorporation that all the incorporators were *bona fide* subscribers. *Rowley's Appeal*, 115 Pa. St. 150 (1887).

A subscription by one of several heirs in the name of the "estate" is not binding on any of the heirs where a statute requires such subscription to be several. *Troy, etc. R. R. v. Warren*, 18 Barb. 310 (1854).

Davidson v. Grange, 4 Grant's Ch. (U. Can.) 377 (1854). In this case a subscription by an agent in his own name was held to constitute him a trustee for his principals.

State v. Lehre, 7 Rich. L. (S. C.) 234 (1854), holding that a statute forbidding any person from subscribing for shares in the name of another person did not exclude a subscription by an agent for his principal.

Cox's Case, 4 De G., J. & S. 53 (1863), was decided under the Companies Act, but the court was inclined to think the result would have been the same independent of that statute. It was there held that where a subscriber, in addition to his own shares, had caused a large number to be registered in the names of mere nominees for him, in order to delude the public as to the number of members, he was rightly placed on the list of contributories for all the shares when the company was wound up. This case was distinguished in *King's Case*, L. R. 6 Ch. App. 196 (1871).

On this question of "dummies," see ch. XIV. See also brief in 15 Ohio St. 332.

If such subscriptions are prohibited by the corporate charter, the principal cannot recover back money which he has given to the agent to subscribe. *Perkins v. Savage*, 15 Wend. 412 (1836).

Mere authority to an agent to subscribe is not a subscription in itself. *Grangers' Market Co. v. Vinson*, 6

for stock in the name of another as trustee, he may maintain an action to compel the trustee to account for the subscription and to turn it over upon payment being made.¹ A claim that a person who took stock did so as trustee or agent for the benefit of another person is a claim which can be proved by oral testimony, but must be clearly proved and must be founded on a sufficient consideration. "Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty."² The subscriptions of the original incorporators may be made by an agent.³ But no person can be made a subscriber to the capital stock of a corporation, and be subjected to the liabilities of a subscriber, by a subscription in his name, made by another without authority, but assuming to act as his agent. Such a subscription is not binding on the principal.⁴ Such an unauthorized sub-

Oreg. 172 (1876). Also, *New Brunswick, etc. Co. v. Muggeridge*, 4 Hurl. & N. 160 (1859).

In New York it is a penal offense for a person to subscribe for another who does not intend to pay, or to subscribe in the name of a fictitious person. N. Y. Penal Code, § 590.

Where one subscribes for stock in his own name, in pursuance of a verbal agreement between himself and another that the stock should belong to them jointly, and that he should hold it on joint account, and, the company subsequently becoming insolvent, the stockholders are called on to contribute an amount equal to their stock, it was held, in New York, that the nominal owner of the stock might have contribution from the joint owner. *Stover v. Flack*, 30 N. Y. 64 (1864). In *Orr v. Bigelow*, 14 N. Y. 556 (1856), the parties had covenanted that plaintiffs should subscribe for stock, pay ten per cent. thereon, and then assign it to defendant, who engaged to indemnify them from further liability. Defendant refused to take the shares, and the corporation recovered judgment against plaintiffs for the balance of the sub-

scription. In this action plaintiffs had judgment against defendant upon the covenant, the measure of damages being held to be the balance paid by them, and not that sum less the market value of the stock. A state subscribing through its officers is bound by their acts as directors. *State v. Jefferson Turnp. Co.*, 3 Humph. (Tenn.) 305 (1842). In *Colt v. Clapp*, 127 Mass. 476 (1879), where one who had verbally agreed to purchase stock for the joint benefit of himself and others refused to divide the stock, he was held accountable to the others for their respective shares of dividends paid thereon in actions for money had and received.

¹ *McComb v. Frink*, 149 U. S. 629 (1893).

² *Levi v. Evans*, 57 Fed. Rep. 677 (1893).

³ *Re New York, etc. R'y*, 99 N. Y. 12 (1885).

⁴ *Ticonic, etc. Co. v. Lang*, 63 Me. 480 (1874); *Pim's Case*, 3 De G. & Sm. 11 (1849); *Henessey's Case*, 3 De G. & Sm. 191 (1850); *Ex parte Hall*, 1 Macn. & G. 307 (1849).

Drover v. Evans, 59 Ind. 454 (1877), holding that where an agent to make

scription, however, may be adopted and ratified by the person in whose name it was made without warrant of authority, in such a way as to make it valid and binding.¹ A person subscribing for shares as agent for another, and in that other's name, but without authority, thereby becomes himself a subscriber in place of the person whose name he signs, or his unauthorized subscription may subject him to an action for damages.²

a subscription exceeds his authority the principal is not bound by it.

Cf. Chapman & Barker's Case, L. R. 3 Eq. 361 (1867). And this is equally the rule when it is sought to charge one by such a subscription, not in his individual capacity, but only in the capacity of trustee for another. *Ex parte* Hall, 1 Macn. & G. 307 (1849).

¹ *Musgrave v. Morrison*, 54 Md. 161 (1880); *Mississippi, etc. R. R. v. Harris*, 36 Miss. 17 (1858), where the defendant promised to pay; *Jones v. Milton, etc. Co.*, 7 Ind. 547 (1856), where the principal subscribed over again; *Philadelphia, etc. R. R. v. Cowell*, 28 Pa. St. 329 (1857), where the defendant acquiesced for seven years; *Putnam v. New Albany*, 4 Biss. 365 (1869); *S. C.*, 20 Fed. Cas. 79, where the city ratified.

What acts or omissions, short of express ratification, will in law suffice to bind one upon such a subscription, is, in general, a question for the jury. *Philadelphia, etc. R. R. v. Cowell*, 28 Pa. St. 329 (1857). *Cf.* *Fox v. Clifton*, 6 Bing. 776 (1830). It is held that silence or failure to object to the subscription for a considerable time after knowledge of it is brought to the subscriber is evidence of a ratification. *McHose v. Wheeler*, 45 Pa. St. 32 (1863); *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 171, 242, 291, 293 (1885); *Sanger v. Upton*, 91 U. S. 56 (1875). *Contra*, *Hume v. Commercial Bank*, 9 Lea (Tenn.), 728 (1882). And giving a proxy to vote the stock may be sufficient to ratify such a subscription. *McCully v. Pittsburgh, etc. R.*

R., 32 Pa. St. 25 (1858). *Contra*, *McClelland v. Whiteley*, 11 Biss. 444 (1883). But a mere declaration to strangers, by the person in whose name the subscription had been made, that he had taken that amount of stock, is not a ratification of the subscription. *Rutland, etc. R. R. v. Lincoln*, 29 Vt. 206 (1857). And even the fact that one whose name had been in this way put down as a subscriber was a director in the corporation was held not to imply knowledge that his name was on the books as a subscriber. *Hallmark's Case*, L. R. 9 Ch. D. 329 (1878). *Cf.* *Fox v. Clifton*, 6 Bing. 776 (1830). But as a rule it is believed that accepting the office of a director would, in this country, be held a sufficient ratification of such a subscription, in the absence of any other. This is expressly declared to be the rule in Tennessee and elsewhere. *Moses v. Ocoee Bank*, 1 Lea (Tenn.), 398 (1878); *Danbury, etc. R. R. v. Wilson*, 22 Conn. 435 (1853). *Cf.* *Fry v. Lexington, etc. R. R.*, 2 Metc. (Ky.) 314 (1859). *Contra*, *Hume v. Commercial Bank*, 9 Lea (Tenn.), 728 (1882).

But where an agent takes stock as agent, on condition that it is to be submitted to the principal, and, "if approved, to be taken out in the purchase of thread," the principal is not bound where he declines to accept, even though he did not notify the corporation of his refusal. *Merrick Thread Co. v. Philadelphia, etc. Co.*, 115 Pa. St. 314 (1887).

² *Salem Mill-dam Corp. v. Ropes*, 26

A person who subscribes for stock through another as agent may be held liable as an original subscriber, the subscription having been made in his name.¹ Where a bank desires to subscribe to the stock of a trust company, but cannot legally do so, and its directors give their note in payment, they are liable on the note to the receiver of the trust company.²

§ 69. *Subscriptions taken by an unauthorized agent of the corporation.*—A subscription taken by a person who has no authority from the corporation to take subscriptions is not in general enforceable.³ But it has been held that such a subscription may, by acceptance and ratification on the part of the corporation, be validated, and the subscriber made liable as though the subscription had been regularly taken.⁴

§ 70. *Unissued or increased capital stock—Right to subscribe therefor.*—Where the whole capital stock or a part of the authorized capital stock is offered for subscription, and a part only of the amount so offered is subscribed for, the remainder may be taken by any person, even though that person is a director in the company. But where the part offered for subscription is not taken, or where a part of the authorized capital stock is offered and is all taken, and subsequently it is resolved to issue more of the authorized capital, or where the capital stock is increased under the statutes and the increase is about to be issued, then a different rule prevails. Every existing stockholder then has the right to subscribe at par for such a proportion of the stock to be issued as his old holdings bear to the amount of stock then outstanding.⁵ Any other rule

Mass. 187 (1829). In some jurisdictions it is held that by such a subscription the subscriber makes himself personally liable as a subscriber. *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880); *State v. Smith*, 48 Vt. 266 (1876). See also *Troy, etc. R. R. v. Warren*, 18 Barb. 310 (1854); *Pugh & Sharman's Case*, L. R. 13 Eq. 566 (1872); *McHose v. Wheeler*, 45 Pa. St. 32; *Thompson v. Reno, etc. Bank*, 19 Nev. 103, 171, 242, 291, 293 (1885); § 249, *infra*.

¹ *Evans v. Texas, etc. Co.*, 4 Tex. Civ. App. 326 (1893).

² *Adams v. Kennedy*, 34 Atl. Rep. 659 (Pa., 1896).

³ *Essex Turnp. Corp. v. Collins*, 8 Mass. 292 (1811); *Shurtz v. Schoolcraft, etc. R. R.*, 9 Mich. 269 (1861); *Carlisle v. Saginaw, etc. R. R.*, 27 Mich. 315 (1873). *Contra*, *Northeastern R. R. v. Rodrigues*, 10 Rich. L. (S. C.) 278 (1857).

⁴ *Walker v. Mobile, etc. R. R.*, 34 Miss. 245 (1857); *Mobile, etc. R. R. v. Yandal*, 5 Sneed (Tenn.), 294 (1858); *Judah v. American, etc. Co.*, 4 Ind. 333 (1853).

⁵ See §§ 286, 615, 653, *infra*.

would enable the parties in control to seize the new stock, in some cases for gain because the stock is worth more than par, and in other cases so as to acquire increased votes at a coming election. In either case this would work a fraud on the other stockholders.¹ Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the transfer aside as fraudulent.²

C. AN ACTION LIES TO COLLECT SUBSCRIPTIONS.

§ 71. *A subscription for shares implies a promise to pay for them, and this promise sustains an action to collect, without proof of any particular consideration.*³—This rule of law is sustained by the great weight of authority. The signing of the subscription paper is an implied promise to pay the subscription.⁴

¹ See § 286, *infra*, and § 65, *supra*. Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. *Morris v. Stevens*, 178 Pa. St. 563 (1897).

Where, long after the company has commenced to do business, it has disposed of its property and is ready to declare a five hundred per cent dividend, the directors issue to themselves at par that part of the original capital stock which never had been issued, it is a fraud on the remaining stockholders. *Arkansas, etc. Soc. v. Eichholtz*, 45 Kan. 164 (1891).

² *Hilles v. Parrish*, 14 N. J. Eq. 380 (1863).

³ Quoted and approved in *Ventura, etc. R'y v. Collins*, 46 Pac. Rep. 287 (Cal., 1896); *San Joaquin, etc. Co. v. Beecher*, 101 Cal. 70 (1894); *Succession of Thomson*, 46 La. Ann. 1074 (1894), and *Puget Sound, etc. R. R. v. Ouellette*, 7 Wash. 265 (1893). See also § 203, *infra*; *Pittsburg, etc. Assoc. v. Swan*, 51 Pac. Rep. 583 (Kan., 1897).

⁴ *Upton v. Tribilcock*, 91 U. S. 45 (1875); *Hawley v. Upton*, 102 U. S. 314 (1880); *Webster v. Upton*, 91 U. S. 65 (1875); *Waukon, etc. R. R. v. Dwyer*, 49 Iowa, 121 (1878); *Nulton v. Clayton*, 54 Iowa, 425 (1880); *Miller v. Wild Cat, etc. Co.*, 52 Ind. 51 (1875); *Mitchell v. Beckman*, 64 Cal. 117 (1883); *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227 (1867); *Beene v. Cahawba, etc. R. R.*, 3 Ala. 660 (1842); *Fry v. Lexington, etc. R. R.*, 2 Metc. (Ky.) 314 (1859); *Gill v. Kentucky, etc. Co.*, 7 Bush (Ky.), 635 (1870); *Mount Sterling, etc. Co. v. Little*, 14 Bush (Ky.), 429 (1879); *Chase v. East Tenn. R. R.*, 5 Lea (Tenn.), 415 (1880). Even though the corporation has the power to

There have been various opinions of the courts as to the consideration supporting this implied promise which sustains an action to collect the subscription. It has been held that the right to membership in the proposed corporation, and the prob-

forfeit the shares for non-payment. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Dexter, etc. Co. v. Millerd*, 3 Mich. 91 (1854).

As to enforceability of subscriptions, not for stock, but as a gift to enterprises, see *Rogers v. Galloway F. College*, 44 S. W. Rep. 454 (Ark., 1898); *Smith v. Burton*, 59 Vt. 408 (1887); *McCabe v. O'Connor*, 69 Iowa, 134 (1886); *Broadbent v. Johnson*, 2 Idaho, 300 (1887), where subscription was to a railroad; *Gans v. Reimensnyder*, 2 Atl. Rep. (Pa.) 425, note; *Grand Lodge v. Farnham*, 70 Cal. 158 (1886); *Roberts v. Cobb*, 103 N. Y. 600 (1886); *Utica, etc. R. R. v. Brinckerhoff*, 21 Wend. 139 (1839); *Watkins v. Evans*, 63 Mass. 537 (1852). See also *Davis v. Smith Am. Organ Co.*, 117 Mass. 456 (1875); *Presbyterian Church v. Cooper*, 112 N. Y. 517 (1889); *Cottage, etc. Church v. Kendall*, 121 Mass. 529 (1877); *Livingston v. Rogers*, 1 Caines' T. R. 583 (1804); *Hamilton College v. Stewart*, 1 N. Y. 581 (1848); *Van Rensselaer v. Aiken*, 14 N. Y. 126 (1870); *Presbyterian Soc. v. Beach*, 74 N. Y. 72 (1878); *Hutchins v. Smith*, 46 Barb. 235 (1865); *Amherst Academy v. Cows*, 23 Mass. 427 (1828).

A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. *Ayres v. Dutton*, 87 Mich. 528 (1891).

A subscription to a church may be enforced by the bishop in whose name the title is taken, he being one of those to whom it is payable. *Egan v. Bonacum*, 38 Neb. 577 (1894). A subscription for stock may be changed to a donation. *Lake Manawa R'y v. Squire*, 89 Iowa, 576 (1894).

Difficulty was experienced in the form of contract for subscriptions for a proposed World's Fair corporation

in 1889. The form adopted was as follows:

"The undersigned, in consideration of the advantages which will result to us respectively from concert of action, and of other good causes and considerations, and the efforts to be made by Samuel D. Babcock [giving names], to procure the subscriptions hereinafter provided for, and the organization of a corporation to control and manage such exposition, do agree, each for himself, to pay to the said Samuel D. Babcock and his associates hereinabove named, or at their request, to said corporation, the respective amounts set opposite our names upon the following terms and conditions, to wit:

"Such subscription shall not be binding until such corporation shall be organized.

"No subscription shall be binding until the said Samuel D. Babcock and his associates above named shall have succeeded in obtaining subscriptions hereto to the amount of at least \$5,000,000.

"Such subscription shall be a preliminary or guarantee fund to be paid in instalments of not more than one-fourth of their respective amounts at any one time, upon calls for the same, made at intervals of not less than three months by the said Samuel D. Babcock and his associates, or, if they shall so determine, by the said corporation; and when such subscriptions shall be fully paid, certificates shall be issued entitling each subscriber to share ratably with all other subscribers to the capital stock of such corporation in all assets and funds that remain after the conclusion of the exposition, the closing of all its accounts, the payment of all its liabilities of every nature, and the liquidation of all its expenses.

"In no event shall the subscribers to this fund be liable for any debts or obligations growing out of this subscription or of said exposition, except to the extent of their several subscriptions, and the certificates to be issued shall be in such form as to avoid any claim for personal liability.

"The money paid by said subscribers shall be expended by said corporation only for the purposes of said exposition.

"Calls for payment of subscriptions shall be on not less than ten days' notice to be sent by mail to the address given opposite the name of each subscriber, any other notice being hereby expressly waived.

"Samuel D. Babcock and his associates

able advantages to be derived from membership in the company, constitute the consideration.¹

It has been held, also, that the stock to be received and the probable dividends thereon constitute the consideration.²

And, again, it has been held that a consideration is conclusively implied from the fact of subscription itself; that it is implied by law; and that the law thereby creates a duty and liability to pay for the stock.³

The particular motive of a subscriber inducing him to subscribe is immaterial. The consideration which exists in law can-

hereinabove named having been thus contracted with by the subscribers because of their having been selected as a finance committee aforesaid in aid of the aforesaid exposition, it is hereby further agreed that all stipulations in the agreement made dependent upon the action of said Babcock and his associates shall be considered as fully met by the action of the majority of them; and in case of vacancy by death, resignation, or otherwise, such vacancy may be filled by their survivors." See 44 N. Y. 126.

¹ Lake Ontario, etc. R. R. v. Mason, 16 N. Y. 451 (1857); Osborn v. Crosby, 63 N. H. 583 (1885); Bullock v. Fal-mouth, etc. Co., 85 Ky. 184 (1887). "It is well settled," said Hand, J., in Fort Edward, etc. Co. v. Payne, 17 Barb. 567 (1854), "that a subscription to the capital stock of any company, from the membership of which a shareholder may derive pecuniary advantage, gives to the subscriber such an interest as will support a promise to pay for the shares. Such an enterprise is a combination of means for mutual profit, and is in no sense a gift or promise without consideration." In another case it is said that "the advantages to be derived from being a member of such a company, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and where the agreement secures that advantage to the subscriber, on the organization of the company, the objection of a want of consideration cannot be made with success." Ham-

ilton, etc. Co. v. Rice, 7 Barb. 157 (1849), adopted by Brown, J., in Lake Ontario, etc. R. R. v. Mason, 16 N. Y. 451, 463 (1857).

² Schenectady, etc. Co. v. Thatcher, 11 N. Y. 102, 107 (1854); Bish v. Bradford, 17 Ind. 490 (1861); New Albany, etc. R. R. v. Fields, 10 Ind. 187 (1858); Fry v. Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859); Selma, etc. R. R. v. Tipton, 5 Ala. 787 (1843); Danbury, etc. R. R. v. Wilson, 22 Conn. 435 (1853); East Tennessee, etc. R. R. v. Gammon, 5 Sneed (Tenn.), 567 (1858). And again, that the prior proceedings and acts of the parties are a legal basis for the promise to pay; also, that the partial execution of the purpose designed by the charter is a sufficient consideration. Kennebec, etc. R. R. v. Palmer, 34 Me. 366 (1852); Amherst Academy v. Cows, 23 Mass. 427 (1828); Ohio, etc. College v. Higgins, 16 Ohio St. 20 (1864). Cf. McCully v. Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858). In Minnesota the implied promise to issue the stock is declared to be the consideration for the promise to pay for it. St. Paul, etc. R. R. v. Robbins, 23 Minn. 439 (1877). And in Kentucky it is held that the promise by each of the subscribers is a sufficient consideration for the promises of the others. Twin Creek, etc. Co. v. Lancaster, 79 Ky. 552 (1881).

³ East Tennessee, etc. R. R. v. Gammon, 5 Sneed (Tenn.), 567 (1858).

not be allowed to be governed by the ideas of the subscriber.¹ The assignee of a subscription may enforce it.² The remedy of a corporation to collect subscriptions is not in equity, even though the defense will be that the board of directors released the subscription and the company claims that such release was fraudulent.³

§ 72. *Such is the rule for subscriptions before incorporation as well as those after — Acceptance of the subscription — Withdrawal.*— Such, undoubtedly, is the rule sustained by the great weight of authority.⁴ It has been held, also, that the corpora-

¹ Illinois River R. R. v. Zimmer, 20 Ill. 654 (1858); Miller v. Wild Cat, etc. Co., 52 Ind. 51, 64 (1875); Andover, etc. Corp. v. Gould, 6 Mass. 39, 44 (1809); Parker v. Northern Central, etc. R. R., 33 Mich. 23 (1875).

² See § 111, *infra*.

³ Sigua Iron Co. v. Clark, 77 Fed. Rep. 496 (1896).

⁴ Richelieu Hotel Co. v. International, etc. Co., 140 Ill. 248 (1892); San Joaquin, etc. Co. v. Beecher, 101 Cal. 70 (1894); Branch v. Augusta Glass Works, 95 Ga. 573 (1895); Auburn, etc. Assoc. v. Hill, 113 Cal. 382 (1896); Nickum v. Burckhardt, 47 Pac. Rep. 788 (Oreg., 1897); Succession of Thomson, 46 La. Ann. 1074 (1894); West v. Crawford, 80 Cal. 19 (1889); Marysville, etc. Co. v. Johnson, 93 Cal. 538 (1892); San Joaquin, etc. Co. v. West, 94 Cal. 399 (1892); McCormick v. Great Bend, etc. Co., 48 Kan. 614 (1892); Minneapolis, etc. Co. v. Crevier, 39 Minn. 417 (1888); Penobscot R. R. v. Dummer, 40 Me. 172 (1855); Athol, etc. Co. v. Carey, 116 Mass. 471 (1875); Ashuelot, etc. Co. v. Hoit, 56 N. H. 548 (1876); Cross v. Pinckneyville Mill Co., 17 Ill. 54 (1855); Griswold v. Peoria University, 26 Ill. 41 (1861); Stone v. Great Western Oil Co., 41 Ill. 85 (1866); City Hotel v. Dickinson, 72 Mass. 586 (1856); Heaston v. Cincinnati, etc. R. R., 16 Ind. 275 (1861); Miller v. Wild Cat, etc. Co., 52 Ind. 51 (1875); Peninsular R. R.

v. Duncan, 28 Mich. 130 (1873); Essex Bridge Co. v. Tuttle, 2 Vt. 393 (1830); Kirksey v. Florida, etc. Co., 7 Fla. 23 (1857); Beene v. Cahawba, etc. R. R., 3 Ala. 660 (1842); Selma, etc. R. R. v. Tipton, 5 Ala. 787 (1843); Hartford, etc. R. R. v. Kennedy, 12 Conn. 499 (1838); Thigpen v. Mississippi Cent. R. R., 32 Miss. 347 (1856); Gill v. Kentucky, etc. Co., 7 Bush (Ky.), 635 (1870); Instone v. Frankfort Bridge Co., 2 Bibb (Ky.), 576 (1812); Cucullu v. Union Ins. Co., 2 Rob. (La.) 573 (1842); Nulton v. Clayton, 54 Iowa, 425 (1880); Worcester Turnp. Co. v. Willard, 5 Mass. 80 (1809); Twin Creek, etc. Co. v. Lancaster, 79 Ky. 552 (1881); Minneapolis, etc. Co. v. Davis, 40 Minn. 110 (1889). Cf. Thompson v. Page, 42 Mass. 565 (1840); Ives v. Sterling, 47 Mass. 310 (1843); Robinson v. Edinboro Academy, 3 Grant's Cas. (Pa.) 107 (1861); Edinboro' Academy v. Robinson, 37 Pa. St. 210 (1860); People's Ferry Co. v. Balch, 74 Mass. 303 (1857); Chater v. San Francisco, etc. Co., 19 Cal. 219 (1861); Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520 (1825); Klein v. Alton, etc. R. R., 13 Ill. 514 (1851); Banet v. Alton, etc. R. R., 13 Ill. 504 (1851); Sanger v. Upton, 91 U. S. 56 (1875); Kidwelly Canal Co. v. Raby, 2 Price, 93 (1816); Weiss v. Mauch Chunk Iron Co., 58 Pa. St. 295 (1868). A subscription to a corporation to be organized is enforceable by the corporation.

tion may bring an action at law for damages against a subscriber to a preliminary subscription list who refuses to take and pay for the stock;¹ and that the measure of damages for such a breach of contract to subscribe for stock is the difference between the par and market value of the stock involved.² It has been held that a corporation can defeat a subscriber's action for stock by proving that it never accepted his subscription.³ But no formal acceptance by the corporation is necessary in order to enforce a subscription.⁴ The right of a subscriber to withdraw from his subscription is considered elsewhere.⁵

Auburn, etc. Assoc. v. Hill, 32 Pac. Rep. 587 (Cal., 1893). The corporation may collect a subscription to its stock obtained prior to the incorporation, the subscriber having attended meetings and acquiesced in expenditures. International Fair Assoc. v. Walker, 83 Mich. 386 (1890). A subscription before incorporation is enforceable, where defendant paid for one or more shares after incorporation. Bell's Appeal, 115 Pa. St. 88 (1887). Where a subscriber before incorporation is offered the stock by the corporation on certain conditions which he refuses, he is not liable as a stockholder. Medler v. Albuquerque, etc. Co., 28 Pac. Rep. 551 (N. M., 1892). A subscription with an express promise to pay to an agent specified upon the incorporation of the company is collectible by him. West v. Crawford, 80 Cal. 19 (1889).

¹Quick v. Lemon, 105 Ill. 578 (1883); Thrasher v. Pike County R. R., 25 Ill. 393 (1861); Rhey v. Ebensburg, etc. Co., 27 Pa. St. 261 (1856); Mt. Sterling, etc. Co. v. Little, 14 Bush (Ky.), 429 (1879).

²Thrasher v. Pike Co., etc. R. R., 25 Ill. 393 (1861). In Pennsylvania a statute which authorized a corporation to transfer a subscription from one enterprise to another has been held unconstitutional. Pittsburgh, etc. R. R. v. Gazzam, 32 Pa. St. 340 (1858).

³A subscriber for stock is not a stockholder until the company accepts the subscription. Badger Paper Co. v. Rose, 95 Wis. 145 (1897); Starrett v. Rockland F. & M. Ins. Co., 65 Me. 374 (1876).

⁴Strasburg R. R. v. Echternacht, 21 Pa. St. 220 (1853); Miller v. Wild Cat, etc. Co., 52 Ind. 51 (1875); Thrasher v. Pike County R. R., 25 Ill. 393 (1861); Mount Sterling, etc. Co. v. Little, 14 Bush (Ky.), 429 (1879); California, etc. Co. v. Schafer, 57 Cal. 396 (1881); Charlotte, etc. R. R. v. Blakely, 3 Strobb. L. (S. C.) 245 (1848); Pittsburgh, etc. R. R. v. Gazzam, 32 Pa. St. 340 (1858); Wallingford Mfg. Co. v. Fox, 12 Vt. 304 (1840); Stowe v. Flagg, 72 Ill. 397 (1874); Goff v. Winchester College, 6 Bush (Ky.), 443 (1869); Perkins v. Union, etc. Co., 94 Mass. 273 (1866); Dayton, etc. Co. v. Coy, 13 Ohio St. 84 (1861). See also various cases in the first part of this chapter, and Brownlee v. Ohio, etc. R. R., 18 Ind. 68 (1862); Kelner v. Baxter, L. R. 2 C. P. 174 (1866). A person is not a stockholder where he offers to sell land for stock, and the corporation accepts the offer, but does not notify him. Cozart v. Herndon, 114 N. C. 252 (1894). As to the defense that the enterprise was abandoned, see § 189, *infra*.

⁵See § 169, *infra*.

§ 73. *The New York rule.*—New York presents decisions on various sides of this subject. In that state the rule is rigidly applied that liability is enforced only when a contract to pay is proved. This contract may be express or implied. New York, however, is not inclined to imply the contract. Thus, a purchaser of bonds from the company who takes a bonus of stock without paying for it is not under any implied contract to pay for it.¹ A person who receives stock from the corporation at less than par, without any written agreement whatsoever in regard thereto, is not liable at common law for any further sums. "The liability is everywhere made to depend upon contract."² A person to whom stock is transferred without his knowledge is not liable thereon.³ An agreement of various persons with each other to subscribe for stock cannot be enforced by the corporation.⁴ And where the statute prescribes the method of subscription, a subscription made in another way cannot be enforced.⁵

¹ Even though a corporation in selling its mortgage bonds makes a gift to the purchaser of a bonus of stock which has not been paid up, yet neither the corporation nor a judgment creditor of the corporation can claim subsequently that a person receiving such stock is liable thereon. There is no contract imposing any such liability. *Christensen v. Eno*, 106 N. Y. 97 (1887). Compare § 42, *supra*.

² *Seymour v. Sturgess*, 26 N. Y. 134 (1862).

³ A stockholder's liability on stock rests solely upon a promise to pay, express or implied. If no express promise is claimed, and it appears that the party never accepted the position of stockholder, but that it was put upon him without authority and against his will, and that upon learning of it he repudiated it, he cannot be held liable. So held where stock was transferred to a party. *Glenn v. Garth*, 133 N. Y. 18 (1892). A promise, express or implied, must be proved in order to enforce a sub-

scription. *Rochester, etc. Co. v. Roe*, 7 N. Y. App. Div. 366 (1896).

⁴ A person signed the following agreement: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad to the amount set opposite our names respectively, on condition said road be located and built through or north of the village of Unionville in Parma." It seems that the railroad company was in existence at the time of the subscription. The company became insolvent and its property was sold and the purchaser built the road. The court held that the insolvent company could not enforce the above subscription, inasmuch as it was not a party to it, and that as to the company the contract was without consideration and there was no proof that the contract was for its benefit. *Lake Ontario Shore R. R. v. Curtiss*, 80 N. Y. 219 (1880).

⁵ Where the statute prescribes that the subscribers for stock shall sub-

On the other hand, a direct subscription to "take" stock may be enforced by the corporation, even though such subscription was made prior to the incorporation.¹ A subscription made to

scribe the articles of incorporation, a person who, prior to incorporation, subscribes for stock and agrees to pay for it, but does not sign the articles of incorporation, cannot be held liable by the corporation on his subscription. *Poughkeepsie, etc. Co. v. Griffin*, 24 N. Y. 150 (1861); *Troy, etc. R. R. v. Tibbits*, 18 Barb. 297 (1854).

A person who signs the certificate of organization, acts as director, indorses other certificates of stock, and declares himself to be a stockholder, may or may not be liable as a stockholder. Where, in addition thereto, he signed an agreement with other corporators to take and pay for certain stock, he is liable as a stockholder, even though a subscription by itself would not constitute a contract with the company. *Powers v. Knapp*, 71 Hun, 371 (1893).

¹ Where a person, with others, prior to incorporation, signs his name in a memorandum book containing an agreement that, "in consideration of and for the purpose of becoming stockholders in" the B. & J. R. R. Co., they "do hereby subscribe and take the number of shares . . . of the capital stock of said company set opposite [their] respective names," and they agree to pay therefor "as required by said company," and where such person after incorporation pays two calls on the stock, he is liable for the remainder. *Buffalo, etc. R. R. v. Gifford*, 87 N. Y. 294 (1882).

Where a person prior to the incorporation of a company signs a paper as follows: "We, the subscribers, agree to take the number of shares by us subscribed," etc., and after his name writes the words "twenty shares," the corporation, after organization, may enforce the subscription.

Buffalo, etc. R. R. v. Dudley, 14 N. Y. 336 (1856).

Where there is subscribed to the articles of incorporation a subscription contract by which subscribers agree to take the number of shares set opposite their respective names, and the corporation is subsequently organized and becomes insolvent, a subscriber to such subscription contract is liable on such subscription for the number of shares specified. *Sagory v. Dubois*, 3 Sandf. Ch. 466 (1846).

Where a statute requires that subscribers to the articles of incorporation shall sign for the number of shares they take in the company, a person who so signs cannot, prior to the filing of the articles, withdraw. The corporation after it is organized may enforce his subscription. *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857).

A person who, prior to incorporation, signs at the foot of the articles of incorporation a writing by which he agrees to pay to the directors the sums which he might from time to time be required to pay on his subscription is liable to the corporation after it is organized. *Stanton v. Wilson*, 2 Hill, 153 (1841).

"It has been repeatedly decided that a subscription made before a corporation was *in esse*, with a view to a future incorporation, was binding, and that corporation, subsequently organized, could sustain an action upon it." *Reformed, etc. Church v. Brown*, 17 How. Pr. 287 (1859).

Where a person signed an instrument stating that, for value received, he promised to pay two individuals named a specified sum, for the pur-

the corporation itself after incorporation is of course enforceable by it.¹

§ 74. *In New England a subscription for stock cannot be enforced unless the subscriber expressly promised to pay, or the charter expressly obligated him to do so.*—Such is the rule in New England. It grew out of the peculiar charters of the early turnpike companies, which had shares of stock not limited in amount, but indefinite, so that, as a result, if a subscriber were liable at all, he was liable for the whole capital stock, except so far as it had already been paid in by himself and others. Consequently, inasmuch as these charters gave to the corporation the right to forfeit stock for non-payment of subscriptions, the courts held that an action to collect did not lie, and that the remedy by forfeiture was the only remedy of the corporation.² This rule has become firmly established in the New England states, and still prevails in its application to all classes

pose of building a plank road between two points named, and authorized them to transfer such subscription to a corporation thereafter to be formed for that purpose; and a corporation was afterwards organized to construct the road and the subscription transferred to it, in an action by the corporation to recover the amount, *held*, that the defendant was liable. *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546 (1856).

Where a person, prior to incorporation, signs a subscription contract which should have been attached to the incorporation papers but was not, but afterwards, the corporation having been organized in good faith but not in compliance with the statute, he transfers a mortgage in payment of his subscription, and still later the incorporation is made legal by new papers, and he does not sign, yet if he paid the interest on the mortgage after all this he is liable on the subscription. *Valk v. Crandall*, 1 Sandf. Ch. 179 (1843).

¹The written agreement of a subscriber "to take the shares by him subscribed" is sufficient to sustain

an action against him by the judgment creditor of the corporation. *Spear v. Crawford*, 14 Wend. 20 (1835); *Cole v. Ryan*, 52 Barb. 168 (1868).

A person subscribing to the capital stock of a bank incorporated in New Jersey must pay the subscription to the bank, even though the subscription did not contain an express promise to pay. *Dayton v. Borst*, 31 N. Y. 434 (1865).

A person who, after the incorporation of the company, subscribes for its stock in writing, and in such writing agrees to pay for the same, may be held liable thereon by the corporation. *Dutchess Cotton Mfy. v. Davis*, 14 Johns. 238 (1817); *Highland Turnpike v. M'Kean*, 11 Johns. 98 (1814); *Goshen, etc. Road v. Hurtin*, 9 Johns. 218 (1812); *Fort Edward, etc. Co. v. Payne*, 17 Barb. 567 (1854); *Northern R. R. v. Miller*, 10 Barb. 260 (1851).

²*Worcester, etc. Turnp. Co. v. Willard*, 5 Mass. 80 (1809); *Andover, etc. Turnp. Corp. v. Gould*, 6 Mass. 39 (1809); *New Bedford, etc. Turnp. Corp. v. Adams*, 8 Mass. 138 (1811);

of corporations.¹ A subscriber who merely agrees to “take” a certain amount of stock is not liable on his subscription, at least not until a sale of the stock has been had under the statutory power to sell.² But suit lies if there is an express promise to pay.³

The supreme court of Vermont in a recent decision has refused to follow the rule laid down in Massachusetts, Maine and New Hampshire, and holds that where a party subscribes for stock he may be sued on the subscription, even though he did not expressly promise to pay.⁴

§ 75. *Professor Collin's rules on this subject.*—Professor Collin, of the Cornell Law School, states the law on this subject as follows:

“The following propositions are given as the substantially harmonious net result of much confusion in cases and textbooks. Rambling remarks may be found contrary to each proposition, but very few reported cases have been decided

Essex Turnp. Corp. v. Collins, 8 Mass. 292 (1811); Franklin Glass Co. v. White, 14 Mass. 286 (1817).

¹ Kennebec, etc. R. R. v. Kendall, 31 Me. 470 (1850); Belfast, etc. R'y v. Moore, 60 Me. 561 (1871); New Hampshire Cent. R. R. v. Johnson, 30 N. H. 390 (1855); White Mountains R. R. v. Eastman, 34 N. H. 124 (1856); Essex, etc. Co. v. Tuttle, 2 Vt. 393 (1830); Connecticut, etc. R. R. v. Bailey, 24 Vt. 465 (1852); Atlantic Cotton Mills v. Abbott, 63 Mass. 423 (1852); Katama, etc. Co. v. Jernegan, 126 Mass. 155 (1879); Boston, etc. R. R. v. Wellington, 113 Mass. 79 (1873); Buckfield, etc. R. R. v. Irish, 39 Me. 44 (1854); Russell v. Bristol, 49 Conn. 251 (1881). Cf. Odd Fellows Hall Co. v. Glazier, 5 Harr. (Del.) 172 (1849); Stokes v. Lebanon, etc. Co., 6 Humph. (Tenn.) 241 (1845); City Hotel v. Dickinson, 72 Mass. 586 (1856); Belfast, etc. R. R. v. Cottrell, 66 Me. 185 (1876); Katama Land Co. v. Holley, 129 Mass. 540 (1880); Mechanics', etc. Co. v. Hall, 121 Mass. 272 (1876). In Maine, an agreement to “take and fill” a number of shares has been held equiva-

lent to an express promise to pay for them. Buckfield, etc. R. R. v. Irish, 39 Me. 44 (1854); Penobscot, etc. R. R. v. Bartlett, 78 Mass. 244 (1858); Pitts-burgh, etc. R. R. v. Gazzam, 32 Pa. St. 340 (1858). It is to be noticed that this rule was established before the announcement of the principle of American law, that the capital stock of a corporation is a trust fund for the benefit of its creditors.

When “neither the general laws nor the act by which the plaintiffs were incorporated, nor any by-laws of the company, created any forfeiture of the shares for the non-payment of the assessments, . . . the legal effect of his (defendant's) subscribing for the stock is to render him liable in assumpsit, even where there is no express promise to pay.” Essex, etc. Co. v. Tuttle, 2 Vt. 393 (1830).

² Rockingham, etc. Co. v. Burlingame, 31 Atl. Rep. 23 (N. H., 1893).

³ Northwood, etc. Co. v. Pray, 32 Atl. Rep. 770 (N. H., 1893).

⁴ Windsor Elec. Light Co. v. Tandy, 66 Vt. 248 (1894).

contrary to any one of these propositions upon the facts coming within it, and I believe every proposition can be sustained in any state or federal court:

“(a) A preliminary agreement to form a corporation and take stock therein is not a contract by the subscribers with each other, and cannot be enforced by one or more against any other, but only by the corporation.

“(b) Such an agreement, not made as a step authorized by statute in the process of forming the corporation, is a mere offer to the corporation not yet in existence, and is revocable by any subscriber until the birth of the corporation, which operates as an acceptance of the offer, and thereafter the subscription, if not previously revoked, is irrevocable and may be enforced by the corporation.

“(c) Such an agreement, made as a step authorized by statute in the process of forming the corporation, is made valid by the statute, and is binding upon each subscriber from the time of signing, and is irrevocable thereafter, but can be enforced only by the corporation.

“(d) An agreement to pay money to trustees, to be by them paid to a corporation thereafter to be created, the trustees to return to the subscribers stock in the corporation accordingly, is a valid contract between the subscribers and the trustees.

“(e) The distinction made between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created is unsound in principle, and disappears as mere *dicta* upon a thorough sifting of the cases.

“(f) The damages recoverable by the corporation upon a subscription is the amount of the subscription; and all discussion of any other measure of damages, such as difference between par and market value of stock subscribed, arises from a misconception of the situation, and disappears from the net result of the authorities.”

§ 76. *Stockholders' agreements to guarantee company debts and stockholders' contracts for the benefit of the corporation.*—An agreement of stockholders to be responsible for future debts of the corporation can be enforced, but the corporation and all the parties are to be made parties defendant.¹

¹ *Farmers' Nat. Bank v. Hannon*, 14 is one of the parties to the agreement Fed. Rep. 593 (1883). If the plaintiff, his remedy is in equity. *Farmers'*

A stockholder's agreement to pay a corporate debt is not void under the statute of frauds, even though it is oral.¹

Where the solvent stockholders agree that they will severally contribute to raise a fund to pay the corporate liabilities, the

Nat. Bank v. Hannan, 4 Fed. Rep. 612 (1880).

An agreement of stockholders to indemnify, protect, and save harmless in proportion to their stock other stockholders who sign corporate notes, construed, and the remedy explained. Taylor v. Coon, 79 Wis. 76 (1891); Taylor v. North, 79 Wis. 86 (1891).

Stockholders who sign corporate notes are co-sureties and not guarantors. Southerland v. Fremont, 107 N. C. 565 (1890).

An agreement of stockholders that if a creditor of the corporation will release certain security they will give other security or that the debt will be paid is a contract of guaranty and not an original undertaking. Home Nat. Bank v. Waterman, 134 Ill. 461 (1890).

A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription if he would pay that is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis v. Shafer, 50 Fed. Rep. 764 (1892). See Doud v. National Park

Bank, 54 Fed. Rep. 846 (1893). Cf. Davis v. Barber, 51 Fed. Rep. 148 (1892); Conrad v. La Rue, 52 Mich. 83 (1883).

Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of non-performance. Gillett v. Bowen, 23 Fed. Rep. 625 (1885). See also § 662, *infra*. If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. Johnson v. Kirby, 65 Cal. 482 (1884). See also, in general, Cates v. Sparkman, 73 Tex. 619 (1889). For the construction of a contract by which the owners of all the stock of a mining company turned it over in pledge to parties who would furnish the money to carry on the mine, see Newton v. Van Dusen, 47 Minn. 437 (1891). For the construction of an agreement whereby a stock and bond holder deposits all his stock and bonds as security to another person who advances money to carry on the business, see Huston's Appeal, 127 Pa. St. 620 (1889). Where a stockholder, owning a majority of the stock, transfers it to a person under a contract by the latter to do certain work for the corporation, and make a loan to the former, and retain the former as president, but the stockholder endeavors to sell out to another party, his bill in equity to set aside the

¹ Emerson v. Slater, 22 How. 28 (1859).

agreement is valid and enforceable, and each must contribute in the proportion that the number of shares held by him bears to the number of shares held by all those who entered into such agreement.¹ But a corporate creditor cannot enforce a per-

transfer as obtained by fraud will fail. *Healey v. Loveridge*, 72 Md. 220 (1890). Where, for the purpose of forwarding a corporate enterprise, one of its chief promoters contracts to give and sell to a third person certain bonds, etc., if the latter will do certain acts, the former cannot, after part performance by the latter, rescind and recover back the bonds, etc., unless he recompenses the latter for his part performance; nor can he rescind at all unless he can recompense the latter. His remedy is for damages. So though defendant is charged with fraud in refusing complete performance. *Snow v. Alley*, 144 Mass. 546 (1887).

¹*Stirling Wrench Co. v. Amstutz*, 50 Ohio St. 484 (1893).

A contract by which stockholders agreed to turn in proportionately the notes of the company as a contribution to the company was construed in *Traders' Nat. Bank v. Smith*, 22 S. W. Rep. 1056 (Tex., 1893).

A corporation may enforce an agreement of the stockholders to contribute to the payment of the debts. *Lillard v. Decatur, etc. Co.*, 36 S. W. Rep. 792 (Tex., 1896).

Where the solvency of a bank is questioned, and the directors give their accommodation notes to the bank to give it credit, such notes are enforceable. *Dykman v. Keeney*, 10 N. Y. App. Div. 610 (1896).

In *Wisconsin, etc. Bank v. Wilkin*, 95 Wis. 111 (1896), the court held that a guaranty by the stockholders of the debts, each of the guarantors agreeing to pay the proportion which his stock held to the whole capital stock, rendered each stockholder lia-

ble for all the debts, it appearing that some of the signers did not hold any of the stock.

A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. *Brown v. Bradford*, 72 N. W. Rep. 648 (Iowa, 1897).

Where certain stockholders agree to pay a proportion of the corporate debts if the other solvent stockholders sign, a partial payment by the former does not prevent their defending against the agreement on the ground that other solvent stockholders have not signed. *Brady v. Eliot*, 37 Atl. Rep. 343 (Pa., 1897).

A subscription to pay *pro rata* the losses of a specific public enterprise was construed in *Laramie v. Tanner*, 71 N. W. Rep. 1028 (Minn., 1897).

As to accommodation notes given by the stockholders to the corporation and the withdrawal of one, see *Patterson v. Bank of B. Columbia*, 26 Oreg. 509 (1895).

A corporation cannot enforce a promise made by a stockholder to a purchaser of his stock that he, the vendor, would pay the corporate debts. *German St. Bank v. Northwestern, etc. Co.*, 74 N. W. Rep. 685 (Iowa, 1898).

An agreement of one stockholder to pay interest on the money invested by the others is binding. The contract may be equivalent to a purchase-money mortgage and may entitle the holders to a foreclosure. *Near v. Donnelly*, 80 Mich. 130 (1890).

son's agreement to pay the corporate debts and take stock in payment.¹

An agreement of stockholders that if a creditor of the corporation will release certain security they will give other security, or that the debt will be paid, is a contract of guaranty and not an original undertaking.²

Where the stockholders loan money to the company to be repaid out of the first net earnings, no repayment will be ordered where the company becomes insolvent and the court distributes the assets.³

"Where stockholders voluntarily assess themselves, to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not debts against, but assets of, the corporation."⁴

Where the vendor agrees by contract with the vendee, and

¹ Washburn v. Interstate Inv. Co., 26 Oreg. 436 (1894). But where the corporation assigns claims to its president upon his guaranty that he will pay therefrom certain corporate debts, such guaranty may be enforced by such creditors. Telford v. Oslin, 27 S. E. Rep. 747 (Ga., 1896).

² Home Nat. Bank v. Waterman, 134 Ill. 461 (1890). Stockholders who sign corporate notes are co-sureties and not guarantors. Southerland v. Fremont, 107 N. C. 565 (1890).

Where the stockholders guarantee the debts of the company, no notice of the acceptance of the guaranty, when acted on, need be given. Doud v. National Park Bank, 54 Fed. Rep. 846 (1893).

Where the vendors of stock guarantee that the stock shall be non-assessable until they have advanced \$30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the \$30,000. Omo v. Bernart, 65 N. W. Rep. 623 (Mich., 1895).

³ Lyman v. Northern, etc. Co., 62 Fed. Rep. 891 (1894).

⁴ Brodriek v. Brown, 69 Fed. Rep. 497 (1895).

A fund raised by the stockholders for the benefit of the creditors and deposited in the bank may be used by the company to pay a debt due to the bank, the bank having no notice of the trust character of the fund. Wyman v. National Bank, 71 N. W. Rep. 277 (Neb., 1897).

Where the owner of oil lands agrees to convey them to a corporation for stock, and to give one-half of the stock to another party, who pays the vendor five thousand dollars and pays to the corporation twenty-five thousand dollars, the twenty-five thousand dollars is not to be credited as a payment by the vendor on an assessment on his stock. Pardee v. Sunset Oil Co., 56 Fed. Rep. 51 (1893).

Where subscribers for stock loaned money to the company on condition that it be repaid to them through a trustee, and repayment is made to the trustee, a corporate creditor can attack the transaction only by a bill in equity. Baltimore, etc. R. R. v. Kensington Land Co., 175 Pa. St. 95 (1896).

accepted by the company, that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services.¹

Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance a certain sum to the company as needed is *ultra vires* and unenforceable.²

An alteration of a corporate note after stockholders have signed as sureties releases the stockholders.³

¹Wetmore v. C. A. Wetmore Co., 113 Cal. 321 (1896). The fact that a vendor of personalty said he would not sell to the corporation, but would to the directors, does not make them liable if the sale was to the corporation. Woodbury Granite Co. v. Muliken, 66 Vt. 465 (1894).

Where certain stockholders agree with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. Rogers v. Burr, 97 Ga. 10 (1895).

²Goss v. Peters, 98 Mich. 112 (1893). Where the condition to a particular subscription is that \$50,000 be subscribed, the verbal guaranty of an individual that the \$50,000 would be subscribed is not a compliance with

the condition. Branch v. Augusta Glass Works, 95 Ga. 573 (1895).

³Pelton v. San Jacinto Lumber Co., 113 Cal. 21 (1896). A modification of the contract between the subscribers and a contractor does not release the former where they accept the work upon the completion of the contract. Gibbons v. Ellis, 83 Wis. 434 (1892). An agreement of stockholders that certain corporate notes will be paid is released by taking new notes from the corporation extending the debt. Home Nat. Bank v. Waterman, 134 Ill. 461 (1891). A note made by the stockholders for the benefit of the corporation may be barred by the statute of limitations, even though the corporation has made partial payments. Patterson v. Collier, 71 N. W. Rep. 327 (Mich., 1897).

CHAPTER V.

CONDITIONAL SUBSCRIPTIONS.

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| <p>§ 77. Definition.</p> <p>78. Conditions precedent and conditions subsequent.</p> <p>79. Conditional subscriptions before incorporation.</p> <p>80. In New York such subscription is void; in Pennsylvania the condition is void.</p> <p>81. Oral conditions are void.</p> <p>82. Conditional subscriptions after incorporation.</p> | <p>§ 83. What may be the condition.</p> <p>84. Acceptance by the corporation is necessary — Withdrawal.</p> <p>85. Construction of the condition.</p> <p>86, 87. Performance of the condition.</p> <p>88. Waiver.</p> <p>89. Notice and calls on conditional subscriptions.</p> |
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§ 77. *Definition of conditional subscription.*—A conditional subscription is one on which payment can be enforced by the corporation only after the occurrence or after the performance by the corporation of certain things specified in the subscription itself.¹ Oral agreements made with the subscriber to the effect that payment will not be required except on certain events or contingencies are sometimes spoken of as conditions to the subscription, but more properly are mere variations of a written contract, and are treated elsewhere.²

§ 78. *Conditions precedent and conditions subsequent.*—A conditional subscription is also to be distinguished from a subscription on a condition subsequent. A subscription on a condition subsequent contains a contract between the corporation and the subscriber, whereby the corporation agrees to do some act. It thereby combines two contracts: one the contract of subscription, the other an ordinary contract of the corporation to perform the specified acts.³ The subscription is valid and

¹ A conditional subscription has often been spoken of as "a continuing offer which is final and absolute when accepted." *Taggart v. Western Md. R. R.*, 24 Md. 563, 595 (1866); *Ash-tabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864); *Lowe v. Edgefield, etc. R. R.*, 1 Head (Tenn.), 659 (1858).

² See ch. IX; also § 81, *infra*.

³ Thus, adding to a subscription

the words, "to be expended between Connecticut river and the east line of the state," has been held to form a contract to that effect, but not to make the subscription conditional. *Lane v. Brainerd*, 30 Conn. 565 (1862); *Henderson, etc. R. R. v. Leavell*, 16 B. Mon. (Ky.) 358 (1855). So, also, of words requiring a certain location or route to be adopted. *Henderson, etc.*

enforceable whether the conditions are performed or not.¹ The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy.² The distinc-

R. R. v. Leavell, 16 B. Mon. (Ky.) 358 (1855); the court saying, however, that if the route is laid out otherwise, before payment, probably the subscriber would be discharged; if changed after payment, it could be enjoined. Laches will bar the right to such an injunction. *Chapman v. Mad River, etc. R. R.*, 6 Ohio St. 119 (1856). A more frequent requirement is a certain location of the route, and also the construction of a part or the whole of the road. The first requirement is construed to be a condition precedent, the second a condition subsequent, since the payment of the subscription itself is necessary to carry out the requirement. *Chamberlain v. Painesville, etc. R. R.*, 15 Ohio St. 225 (1864); *Belfast, etc. R'y v. Moore*, 60 Me. 561, 576 (1871); *North Missouri R. R. v. Winkler*, 29 Mo. 318 (1860); *Bucksport, etc. R. R. v. Brewer*, 67 Me. 295 (1877); *McMillan v. Maysville, etc. R. R.*, 15 B. Mon. (Ky.) 218 (1854); *Swartout v. Michigan, etc. R. R.*, 24 Mich. 389 (1872), where Judge Cooley says: "It is only reasonable to infer that they would have expressed that intent more clearly, and would have indicated with definiteness what stage the work should reach, before their liability should become fixed." So also in *Miller v. Pittsburgh, etc. R. R.*, 40 Pa. St. 237 (1861), where the court says: "It is a most extraordinary defense, for it presupposes that the company were to build their road without money, and to deliver it, a finished work, to the stock subscribers, who were then to pay their subscriptions." In *Pittsburgh, etc. R. R. v. Biggar*, 34 Pa. St. 455 (1859), a condition, "provided the road goes within

half a mile of Florence," was held to be a condition subsequent. A condition that alterations shall be ordered only by a vote of the directors is a condition subsequent. *Bucksport & B. R. R. v. Buck*, 68 Me. 81 (1878). So also of a condition that commissioners should be appointed to see that other conditions are complied with. *Shaffner v. Jeffries*, 18 Mo. 512 (1853). And a condition that the money subscribed shall be expended on a certain part of the road. *Lane v. Brainerd*, 30 Conn. 565 (1862). A condition that a depot shall be established at a certain place is a condition subsequent. *Paducah, etc. R. R. v. Parks*, 86 Tenn. 554 (1888). A condition that bonds will be issued as a "bonus" to a stockholder is void. It is a condition subsequent. The subscription is enforceable. *Morrow v. Nashville, etc. Co.*, 87 Tenn. 262 (1889). Condition construed to be subsequent. *Johnson v. Georgia, etc. R. R.*, 81 Ga. 725 (1888). For the English cases on conditions precedent and subsequent to subscriptions for stock, see ch. II, *supra*.

¹ A condition subsequent "will not defeat an action for the recovery of the money, notwithstanding it had not been performed when the action was commenced." *Belfast, etc. R'y v. Moore*, 60 Me. 561, 576 (1872). "A failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part." *Mill Dam Foundry v. Hovey*, 38 Mass. 417, 437 (1839).

² The subscriber is left to the ordi-

tion between such a contract and the ordinary conditional subscriptions—that is, subscriptions on conditions precedent—is sometimes difficult to determine. The supreme court of Maine has said that the question whether a condition in a subscription “be precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject-matter to which it relates.”¹ The courts, in accordance with well-established rules, favor conditions subsequent.²

§ 79. *Conditional subscriptions not allowed in subscriptions to obtain incorporation.*—Conditional subscriptions made before the incorporation of a company, and taken for the purpose of securing such incorporation, as prescribed by statute, are of doubtful validity. The weight of authority holds that subscriptions taken for the purpose of complying with a statute which grants a charter only upon a certain amount of stock being subscribed cannot be conditional, but must be absolute.³

nary remedies for breaches of contracts.

A subscriber cannot avoid payment as against a corporate creditor although the subscription was on condition that, if the subscription exceeded one-half the cost of a certain building, only so much of the subscription should be called for as would equal that half. The subscriber cannot forfeit what he has paid and refuse to pay the remainder. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

A condition that the subscriptions when collected shall be used to build factories which should be leased was enforced in *Porter v. Carpenter*, 65 N. H. 650 (1874).

A consolidated company is not liable to a subscriber to stock of the original company for removing the shops of the company from a certain place, although the subscription was conditional upon the shops being located there. *Elizabethtown v. Chesapeake*, etc. R. R., 94 Ky. 377 (1893).

Where several persons subscribed on condition that the payee do certain things, and the payee commits a breach of contract, each of the subscribers may sue separately on the breach, and may recover back the amount paid. *Batsell v. St. Louis*, etc. R’y, 4 Tex. Civ. App. 580 (1893).

See also § 97, *infra*.

¹ *Bucksport, etc. R. R. v. Brewer*, 67 Me. 295 (1877). “The situation and relation of the parties to each other, the object sought to be attained, and the subject-matter to which the agreement relates, are material . . . and indispensable aids” in deciding whether the condition be precedent or subsequent. *Chamberlain v. Painesville*, etc. R. R., 15 Ohio St. 225 (1864).

² *Chamberlain v. Painesville*, etc. R. R., 15 Ohio St. 225 (1864); *Swartout v. Michigan*, etc. R. R., 24 Mich. 389 (1872).

³ “A subscription to the stock of a public corporation, made before letters patent are issued and an organ-

This is clearly the rule in New York and Pennsylvania, and is founded in justice.¹

§ 80. *In New York the subscription is void; in Pennsylvania the condition is void.*—The New York and Pennsylvania cases differ, however, in regard to the effect of a conditional subscription to stock before and for the purpose of incorporation. In New York the whole subscription is void absolutely. It is as though not made, and cannot be enforced either by the corporation or by the would-be subscriber.² In Pennsylvania a different rule prevails. The condition is void, but the subscription itself is treated as an absolute unconditional subscription, and may be enforced by the corporation.³ The commissioners are

ization effected, must be considered absolute and unqualified, and any condition attached thereto void. Commissioners have no authority to receive conditional subscriptions." *Boyd v. Peach Bottom R'y*, 90 Pa. St. 169 (1879). "Any other rule would lead to the procurement from the commonwealth of valuable charters without any absolute capital for their support, and thus give rise to a system of speculation and fraud which would be intolerable." *Caley v. Philadelphia*, etc. R. R., 80 Pa. St. 363 (1876). See also *Erie*, etc. Co. *v. Brown*, 25 Pa. St. 156 (1855); *Nippenose Mfg. Co. v. Stadon*, 68 Pa. St. 256 (1871); *Pittsburgh*, etc. R. R. *v. Stewart*, 41 Pa. St. 54 (1861); *Troy*, etc. R. R. *v. Tibbits*, 18 Barb. 297 (1854). That conditional subscriptions are not to be counted in ascertaining whether the whole capital stock has been subscribed, which must be shown before another absolute subscriber can be made liable, see § 180, *infra*.

¹ Some of the old cases uphold conditional subscriptions made previous to and for the purpose of incorporation. *Chamberlain v. Painesville*, etc. R. R., 15 Ohio St. 225 (1864). It is doubtful, however, whether any well-considered case, under the present general laws allowing the incorporation of railroads, would sustain such

a subscription. The weight of authority is decidedly in favor of absolute subscriptions.

² *Troy*, etc. R. R. *v. Tibbits*, 18 Barb. 297 (1854); *Re Rochester*, etc. R. R., 50 Hun, 29 (1888), where the subscription was to be paid in land.

Under the New York statute a conditional subscription, payable one-half when the rails had been laid and one-half when the road goes into operation, is void and cannot be collected. *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118 (1896).

³ "Where one subscribes to the stock of a public corporation prior to the procurement of its charter, such subscription is to be regarded as absolute and unqualified, and any condition attached thereto is void." *Caley v. Philadelphia*, etc. R. R., 80 Pa. St. 363 (1876). "The subscription is valid and binding, and the condition null and void." *Boyd v. Peach Bottom R'y*, 90 Pa. St. 169 (1879). To the same effect see *Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864); *Bavington v. Pittsburgh*, etc. R. R., 34 Pa. St. 358 (1859); *Pittsburgh*, etc. R. R. *v. Biggar*, 34 Pa. St. 455 (1859); *Pittsburgh*, etc. R. R. *v. Woodrow*, 3 Phila. 271 (1858). The subscription itself, however, is not binding if it is not reported by the commissioners and used to obtain the charter. *Ligonier R. R. v. Williams*,

held to have only limited statutory powers, of which the subscriber is bound to take notice, and the express powers do not give authority to the commissioners to take conditional subscriptions. They have no right to receive various kinds of subscriptions, and any conditions are held to be void as a fraud upon the state, upon corporate creditors, and upon other subscribers.¹

§ 81. *Oral conditions are void.*—Under the general rule of evidence that a written agreement cannot be varied or added to by parol evidence, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber.² The condition must be inserted in the writing in order to be effectual. Where, however, the parol agreement or condition is made subsequently to the making of the contract, and upon a sufficient consideration, it has been upheld.³

§ 82. *Conditional subscriptions after incorporation are valid.* A conditional subscription to stock, taken and accepted by a corporation after its incorporation, is legal and valid by the common law of all the states. In Pennsylvania the legality of such conditional subscriptions is clearly declared and sustained.⁴ In New York, also, conditional subscriptions have been upheld,⁵

35 Leg. Int. 40 (1878). In the federal courts, *Burke v. Smith*, 16 Wall. 390, 396 (1872), favors the Pennsylvania rule, while *Putnam v. New Albany*, 4 Biss. 365, 385 (1869); S. C., 20 Fed. Cas. 79, 86, favors the New York rule. In both cases the opinions are *dicta*. See also *Ellison v. Mobile, etc. R. R.*, 36 Miss. 572 (1858).

¹ Same cases.

² See §§ 137, 138, *infra*.

³ See §§ 137, 138, *infra*.

⁴ "It is no longer to be doubted that an incorporated company, after it has obtained its letters patent and effected its organization, may receive conditional subscriptions to its stock." *Pittsburgh, etc. R. R. v. Stewart*, 41 Pa. St. 54 (1861); *Caley v. Philadelphia, etc. R. R.*, 80 Pa. St. 363 (1876); *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857). After incorporation conditional subscriptions

may be received, although the letters patent have not been issued and cannot be until ten per cent of the capital stock is subscribed. The conditional subscription cannot, however, form any part of such percentage. *Hanover, etc. R. R. v. Haldeman*, 82 Pa. St. 36 (1876).

⁵ Ordinary conditional subscriptions were treated as valid in *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880); *Burrows v. Smith*, 10 N. Y. 550 (1853); *Morris Canal, etc. Co. v. Nathan*, 2 Hall (N. Y.), 239 (1829). But the condition that a particular location of the proposed road should be adopted has been held to be contrary to public policy, since improper means would thereby influence the question of location. *Butternuts, etc. Turnp. Co. v. North*, 1 Hill, 518 (1841); *Fort Edward, etc. Co. v. Payne*, 15 N. Y. 583 (1857); *Macedon, etc. Co. v. Sne-*

but not where the condition is one that affects the route of a turnpike or railroad company. In other states the legality of such subscriptions is rarely questioned, but is generally assumed to be admitted.¹

§ 83. *What condition may be attached to a subscription.*—Any condition which can be legally performed or complied with by the corporation may be the condition to a subscription for stock.² The condition may be that payment shall be in labor or materials;³ it may require the expenditure of the subscription on a particular part of the enterprise;⁴ it may stipulate that a certain amount or the whole of the capital stock shall be subscribed before calls are made on the subscriptions;⁵ or it may limit the time within which certain things specified therein must be done.⁶ Instead of subscribing for stock a party

diker, 18 Barb. 317 (1854); *dictum* in *Dix v. Shaver*, 14 Hun, 393 (1878). However, in Lake Ontario, etc. R. R. v. Curtiss, 80 N. Y. 219 (1880), a condition of this kind was involved, and no objection was made to its validity. Subscriptions conditional, in that payment is to be permitted in property, labor, or contract for construction, have been repeatedly passed upon in New York and upheld. See ch. II, *supra*.

¹ "Except in New York, conditional subscriptions, in the absence of a special prohibition, so far as we have observed, have been sustained as authorized and not in conflict with public policy." *Ashtabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864). See also § 97, *infra*; *New Albany, etc. R. R. v. McCormick*, 10 Ind. 499 (1858); *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329 (1896); *McMillan v. Maysville, etc. R. R.*, 15 B. Mon. (Ky.) 218 (1854); *Dayton, etc. R. R. v. Hatch*, 1 Disney (Ohio), 84 (1855). A conditional subscription to the stock of a railroad company is legal. *Baltimore, etc. R. R. v. Pumphrey*, 74 Md. 86 (1891). Conditional subscriptions may be received. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890). If the condi-

tion is *ultra vires* of the corporation, the subscription is not enforceable, there having been no performance. *Pellatt's Case*, L. R. 2 Ch. App. 527 (1867).

² The subscriber "may agree to take and pay for the stock absolutely or upon such conditions as he may choose to incorporate into his subscription." *Penobscot, etc. R. R. v. Dunn*, 39 Me. 587 (1855); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

³ See ch. II, *supra*.

⁴ *Milwaukee, etc. R. R. v. Field*, 12 Wis. 340 (1860); *Hanover Junction, etc. R. R. v. Haldeman*, 82 Pa. St. 36 (1876).

⁵ *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857); *Penobscot, etc. R. R. v. Dunn*, 39 Me. 587 (1855); *Hanover Junction, etc. R. R. v. Haldeman*, 82 Pa. St. 36 (1876); *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880). Even though the charter allowed the commencement of business upon the subscription of a less sum. *Ridgefield, etc. R. R. v. Brush*, 43 Conn. 86 (1875).

⁶ *Ticonic Water Power, etc. Co. v. Lang*, 63 Me. 480 (1874), holding also that time herein is of the essence of the contract. See also *Morris Canal*,

may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene.¹ In most states the condition to a subscription may require the route of a railroad to be located on a particular line.² In New York such a conditional subscription has been held to be void, on the ground of public policy, inasmuch as the discretion of the directors, in laying out the route, would thereby be influenced by considerations other than those of a purely public nature.³

In general, however, subscriptions to the capital stock of a corporation may be conditional as to the time, manner, or means of payment, or in any other way not prohibited by statute, or the rules of public policy, and not beyond the powers of the corporation to comply with.⁴

etc. *Co. v. Nathan*, 2 Hall (N. Y.), 239 (1829). A condition that the road should be finished within a certain time, and that notice thereof should be given in a certain way, was involved in *Garner v. Hall*, 21 S. Rep. 835 (Ala., 1897). See also § 87, *infra*.

¹ *Vent v. Duluth, etc. Co.*, 67 N. W. Rep. 70 (Minn., 1896).

² *Fisher v. Evansville, etc. R. R.*, 7 Ind. 407 (1856); *Connecticut, etc. R. R. v. Baxter*, 32 Vt. 805 (1860); *Cumberland Valley R. R. v. Baab*, 9 Watts (Pa.), 458 (1840); *Evansville, etc. R. R. v. Shearer*, 10 Ind. 244 (1858); *Jewett v. Lawrenceburgh, etc. R. R.*, 10 Ind. 539 (1858); *Missouri Pac. R'y v. Tygard*, 84 Mo. 264 (1884); *Wear v. Jacksonville, etc. R. R.*, 24 Ill. 593 (1860); *Taggart v. Western Md. R. R.*, 24 Md. 563 (1866); *Racine County Bank v. Ayers*, 12 Wis. 512 (1860). See also *Caley v. Philadelphia, etc. R. R.*, 80 Pa. St. 363 (1876). Location may be required to be subject to the approval of the subscriber. *Roberts's Case*, 3 De G. & Sm. 205 (1850); *aff'd*, 2 Macn. & G. 192. See also *Mansfield, etc. R. R. v. Brown*, 26 Ohio St. 223 (1875); *Mansfield, etc. R. R. v.*

Stout, 26 Ohio St. 241 (1875); *Chamberlain v. Painesville, etc. R. R.*, 15 Ohio St. 225 (1864); *North Missouri R. R. v. Winkler*, 29 Mo. 318 (1860); *Spartanburg, etc. R. R. v. De Grafenreid*, 12 Rich. L. (S. C.) 675 (1860); *Des Moines Valley R. R. v. Graff*, 27 Iowa, 99 (1869). A subscription or note, not for stock, but absolutely as a gift to the corporation, in consideration of a particular route being adopted, has been upheld. *Stowell v. Stowell*, 45 Mich. 364 (1881); *First Nat. Bank v. Hendrie*, 49 Iowa, 402 (1878). A subscription or donation to a railroad, conditional on the location of a depot, is enforceable by the company. *Berryman v. Cincinnati Southern R'y*, 14 Bush (Ky.), 755 (1879). See § 650, *infra*. A construction company, under contract to construct a road by the shortest route, cannot collect a sum promised by a third person for a deflection of the route. *Woodstock Iron Co. v. Richmond, etc. Co.*, 129 U. S. 643 (1889).

³ See § 82, n., *supra*.

⁴ Conditions inconsistent with the charter are void. *Thigpen v. Mississippi Cent. R. R.*, 32 Miss. 347 (1856).

§ 84. *Acceptance by the corporation is necessary.*—The acceptance by the corporation of a conditional subscription is necessary to the formation of a contract.¹ Until such acceptance the conditional subscription is but a continuing offer. After acceptance the subscriber is bound, until performance of the condition by the corporation, to await such performance; he cannot withdraw the conditional subscription after it has been accepted. A conditional subscription cannot be revoked after the condition has been fulfilled.² It seems, however, that if the performance of the condition is delayed unreasonably by the corporation, the conditional subscriber will be thereby released from his obligation.³

The conditions which may be legally made to a subscription are practically limited only by the power of the corporation to contract. A few of the conditions which have been passed upon by the courts have been given. Many minor ones are involved in the cases and present a great variety of conditions, corresponding, as they do, to the wishes and motives of individuals subscribing to the stock of the different kinds of joint-stock corporations. The condition of a subscription may be that the subscriber be made district manager. *Mogridge's Case*, 58 L. T. Rep. 801 (1888).

¹ *Junction R. R. v. Reeve*, 15 Ind. 236 (1860), where the subscription was payable in land. See also *Galt v. Swain*, 9 Gratt. (Va.) 633 (1853). "When the offer was accepted the minds of the parties met and the contract was complete. . . . The acceptance by the plaintiff constituted a sufficient legal consideration for the engagement on the part of the defendants." *Taggart v. Western Md. R. R.*, 24 Md. 563 (1866). By the entry of the subscription on the corporate record an acceptance is implied. *New Albany, etc. R. R. v. McCormick*, 10 Ind. 499 (1858). Acceptance by the president of the corporation, and a subsequent ratification by the directors of all his acts, are sufficient.

Pittsburgh, etc. R. R. v. Stewart, 41 Pa. St. 54 (1861). The delivery and acceptance may be proved by parol. *Mansfield, etc. R. R. v. Brown*, 26 Ohio St. 223 (1875). Where it is delivered in escrow to the agent of the corporation, there can be no acceptance of it by the corporation, so long as such delivery continues. *Cass v. Pittsburg, etc. R'y*, 80 Pa. St. 31 (1875). It may be revoked while still in the hands of a person acting as corporate agent without authority. *Lowe v. Edgefield, etc. R. R.*, 1 Head (Tenn.), 659 (1858). See also §§ 72, 167. The subscribers cannot withdraw unless there is unreasonable delay. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890).

² *Philadelphia, etc. R. R. v. Conway*, 177 Pa. St. 364 (1896).

³ Where, the condition not being performed, the subscriber notifies the secretary of his withdrawal from the subscription, he is released. *Wood's Case*, L. R. 15 Eq. 236 (1873). "The objection to a continuing offer, that it suspends indefinitely the liability of the conditional subscribers, is sufficiently answered by the consideration that all such offers are subject to retraction, and may be recalled if their acceptance is unreasonably deferred." *Taggart v. Western Md. R. R.*, 24 Md. 563 (1866); *Mansfield,*

§ 85. *Construction of conditional subscription.*—Conditional subscriptions, like other contracts, are to be construed reasonably and according to the intent of the parties, as indicated by the language used in the contract.¹ The circumstances under which the subscription was made are also to be taken into consideration.² If two interpretations are possible, that which facilitates the enterprise is preferred to that which retards it.³ If the meaning is ambiguous, it is for the jury to say what the interpretation is to be.⁴

§ 86. *Performance of the condition.*—A condition to a subscription for stock must be performed or complied with before the subscriber can be compelled to pay such subscription.⁵ A substantial performance of the condition is sufficient.⁶ A fail-

etc. *R. R. v. Stout*, 26 Ohio St. 241 (1875), which holds that the question of acceptance is immaterial where performance of the condition has been completed by the corporation.

¹ The whole contract is "to be taken together, and to have a reasonable construction according to the intent of the parties." *People's Ferry Co. v. Balch*, 74 Mass. 303, 312 (1857). "The language was chosen by them to express their mutual intent, and such construction must be given thereto as will carry into effect that mutual understanding. . . . We are to ascertain what the parties understood and intended by this language, and may not deviate therefrom, whether that contract, as so interpreted, be wise or unwise for either party." *Memphis, etc. R'y v. Thompson*, 24 Kan. 170 (1880).

² "The contract must be interpreted by the light of the circumstances which existed at the time it was made, and not of those which arose afterwards." *Monadnock R. R. v. Felt*, 52 N. H. 379 (1872); *Detroit, etc. R. R. v. Starnes*, 38 Mich. 698 (1878).

³ *Ashtabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864).

⁴ *Connecticut R. R. v. Baxter*, 32 Vt. 805 (1860).

⁵ *Porter v. Raymond*, 53 N. H. 519 (1873); *Monadnock R. R. v. Felt*, 52 N. H. 379 (1872); *Montpelier, etc. R. R. v. Langdon*, 46 Vt. 284 (1873); *Ashtabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864); *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857); *Burrows v. Smith*, 10 N. Y. 550 (1853); *McFarland v. Lyon*, 4 Tex. Civ. App. 586 (1893). "Upon the performance of the condition by the promisee the contract is clothed with a valid consideration, which relates back, and the promise at once becomes obligatory." *Des Moines Valley R. R. v. Graff*, 27 Iowa, 99 (1869). Upon fulfillment of the condition that a certain amount be subscribed, the subscription may be collected. *Security State Bank v. Raine*, 31 Neb. 517 (1891). A contract of subscription to a railroad company when certain things are done by it is collectible when these things have been done. *Leshner v. Karshner*, 47 Ohio St. 302 (1890). A conditional subscription may be enforced after the condition has been performed. *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893).

⁶ *Hall v. Sims*, 106 Ala. 561 (1895); *O'Neal v. King*, 3 Jones, L. (N. C.) 517 (1856). See also *Virginia, etc. R. R. v. Lyon County*, 6 Nev. 68 (1870); *Springfield Street R'y v. Sleeper*, 121

ure to perform is not excused by reason of unforeseen difficulties arising from floods and natural causes.¹ A conditional subscriber is not a stockholder or member of the corporation until after the condition is performed.² Whether or not the condi-

Mass. 29 (1876); *People v. Holden*, 82 Ill. 93 (1876). Performance must be within a reasonable time. *Stevens v. Corbitt*, 33 Mich. 458 (1876). Subscription on express condition that it shall be payable only in case the whole amount is subscribed cannot be collected, where the whole amount was made up by including the subscriptions of married women who had not paid. *Hahn's Appeal*, 7 Atl. Rep. 482 (Pa., 1886). Condition that subscription shall be payable only when a sum deemed sufficient by the directors has been subscribed is not fulfilled when the directors fixed a sum, and then later reduced the sum to the amount subscribed. Only unconditional subscriptions are to be counted. If performance turns on a writing, the question is for the court. *Brand v. Lawrenceville Branch R. R.*, 77 Ga. 506 (1887). Reasonable performance is all that is required. Thus, the completion of a blast furnace, as a condition, is satisfied by completion by the lessee. *Cornell's Appeal*, 114 Pa. St. 153 (1886). A condition that the company shall construct a road from and to specified points is not fulfilled by the construction of part of the way and running over another railroad for the remainder of the distance. *Brown v. Dibble*, 65 Mich. 520 (1887). *Contra*, *People v. Holden*, 82 Ill. 93 (1876). In the case of *Martin v. Pensacola, etc. R. R.*, 8 Fla. 370, 390 (1859), it is stated, in a *dictum*, that a strict compliance is necessary. But see *Branham v. Record*, 42 Ind. 181 (1873). The question of whether the fulfillment of the condition was in good faith and not merely temporary may be for the jury. *Tabor, etc. R'y v. McCormick*,

90 Iowa, 446 (1894). A subscription to an enterprise, conditional upon the performance of that enterprise by certain named parties and a conveyance of the results to a corporation, may be enforced by such parties upon due performance. *Brewer v. Stone*, 77 Mass. 228 (1858). A subscription to a railroad, conditional upon its completing the road, is not enforceable by a consolidated company which succeeds to and completes the road. *Toledo, etc. R. R. v. Hinsdale*, 45 Ohio St. 556 (1888). Substantial compliance with the condition is sufficient. *Cravens v. Eagle, etc. Co.*, 120 Ind. 6 (1889). Where a subscription is on condition that the railroad company subscribe to the stock of a blast furnace company, a purchase of the furnace company stock by the railroad company is not a compliance with the condition precedent. *Echols v. Bristol*, 90 Va. 165 (1893). A note given on condition that a road be built into a town is not collectible if only a branch of that road was built into the town. *Gulf, etc. R'y v. Pittman*, 4 Tex. Civ. App. 167 (1893). It is no defense that the condition was that the subscriber should have a contract and that after he commenced work the company stopped the work. *Cook v. Hopkinsville, etc. Co.*, 32 S. W. Rep. 748 (Ky., 1895). Where the condition to a particular subscription is that \$50,000 be subscribed, the verbal guaranty of an individual that the \$50,000 would be subscribed is not a compliance with the condition. *Branch v. Augusta Glass Works*, 95 Ga. 573 (1895).

¹ *Memphis, etc. R'y v. Thompson*, 24 Kan. 170 (1880).

² *Chase v. Sycamore, etc. R. R.*, 38

tion has been performed is a question of fact.¹ Performance may be proved by parol or by the records of the corporation.²

§ 87. Where the condition is that the work shall be begun, contracted for, or completed within a certain time, time is of the essence of the contract, and any failure to perform within the time so specified defeats the subscription.³ A condition that the road shall be "permanently" located on a specified route is satisfied by the adoption of that route by the directors.⁴ Where the question of whether performance has been completed rests in the decision of the directors, their conclusion cannot be questioned, unless fraud or bad faith is proved.⁵ A condition that the subscription shall be applied to a particular portion of the road is satisfied by the completion of that portion.⁶ Any fraud on the part of the corporation in the performance of the

Ill. 215 (1865); *Slipher v. Earhart*, 83 Ind. 173 (1882); *Evansville, etc. R. R. v. Shearer*, 10 Ind. 244 (1858); *Ash-tabula, etc. R. R. v. Smith*, 15 Ohio St. 328 (1864).

¹ *Jewett v. Lawrenceburgh, etc. R. R.*, 10 Ind. 539 (1858). And is a question for the jury. *St. Louis, etc. R. R. v. Eakins*, 30 Iowa, 279 (1870).

² By parol. *St. Louis, etc. R. R. v. Eakins*, 30 Iowa, 279 (1870). By corporate records. *Penobscot, etc. R. R. v. Dunn*, 39 Me. 587 (1855). Performance must be alleged in the complaint or declaration. *Trott v. Sarchett*, 10 Ohio St. 241 (1859); *Roberts v. Mobile, etc. R. R.*, 32 Miss. 373 (1856); *Henderson, etc. R. R. v. Leavell*, 16 B. Mon. (Ky.) 358 (1855).

³ *Burlington, etc. R. R. v. Boestler*, 15 Iowa, 555 (1864), per Dillon, J.; *Freeman v. Matlock*, 67 Ind. 99 (1879); *Memphis, etc. R'y v. Thompson*, 24 Kan. 170 (1880); *Portland, etc. R. R. v. Hartford*, 58 Me. 23 (1870). An agreement to pay a corporation a certain sum if it builds and starts a factory within a certain time is not collectible if the contract is not fulfilled within that time. *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164 (1891). If the di-

rectors certify that the condition was performed within the specified time, the subscriber may prove the falsity of their certificate. *Morris Canal, etc. Co. v. Nathan*, 2 Hall (N. Y.), 239 (1829). Upon the failure of the corporation to comply with the condition the subscription ceases to have any vitality "by its own limitation." *Ticonic Water-power, etc. Co. v. Lang*, 63 Me. 480 (1874). In *Missouri Pac. R'y v. Tygard*, 84 Mo. 264 (1884), however, a completion of the road within a reasonable time after the time specified in the condition was held to be a substantial performance, and sufficient, the grading having been completed in the specified time. See also *Moore v. Campbell*, 111 Ind. 328 (1887), where the condition was inserted in a promissory note.

⁴ *Smith v. Allison*, 23 Ind. 366 (1864); and see cases in § 78, *supra*. So also a condition that the road shall cross another at a certain point is satisfied by its being so located. *Wear v. Jacksonville, etc. R. R.*, 24 Ill. 593 (1860).

⁵ *Cass v. Pittsburg, etc. R'y*, 80 Pa. St. 31 (1875).

⁶ *Nichols v. Burlington, etc. Co.*, 4 Greene (Iowa), 42 (1853).

condition may be shown by parol.¹ All of several conditions must be performed before calls are made.² But if one part of the subscription be free from condition, that part may be collected independently.³ Where there are different conditions for different instalments, compliance with the first condition entitles the company to the instalment, even though the second condition is not complied with.⁴ Where, after part payment by the conditional subscriber, the corporate plans are changed, so that the condition is not complied with, the money, it has been held, may be recovered.⁵

§ 88. *Waiver of the condition.*—A conditional subscriber to the stock of a corporation may waive the condition and performance thereof, and thus become liable on his subscription, as though it had been originally an absolute one. The waiver may be by an oral statement or agreement of the subscriber.⁶ Certain acts of the subscriber have been held to indicate an intent to waive a condition to the subscription, and to be equivalent to a direct waiver. Thus, acting as a director,⁷ or as president of the corporation,⁸ paying the whole of the subscription,⁹ giving an absolute promissory note without conditions in payment of the subscription,¹⁰ have each been held to constitute a

¹New York Exchange Co. v. De Wolf, 31 N. Y. 273 (1865).

²Porter v. Raymond, 53 N. H. 519 (1873).

³St. Louis, etc. R. R. v. Eakins, 30 Iowa, 279 (1870).

⁴Coos Bay, etc. v. Dixon, 48 Pac. Rep. 361 (Oreg., 1897).

⁵Jewett v. Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858).

⁶Hanover Junction, etc. R. R. v. Haldeman, 82 Pa. St. 36 (1876). See also Woonsocket Union R. R. v. Sherman, 8 R. I. 564 (1867). A municipality may waive conditions which it makes to its subscription. Graves v. Saline County, 161 U. S. 359 (1896). Conditions may be waived by the acts of the subscriber. Seymour v. Jefferson, 74 N. W. Rep. 149 (Minn., 1898).

⁷Lane v. Brainerd, 30 Conn. 565 (1862).

Where a person subscribes for preferred stock, but no preferred stock is provided for, and he becomes a director and acts as such for several years, he is liable on such stock to corporate creditors, as though it were a subscription for common stock. Tama Water-power Co. v. Hopkins, 79 Iowa, 653 (1890).

⁸Dayton, etc. R. R. v. Hatch, 1 Disney (Ohio), 84 (1855).

⁹Parks v. Evansville, etc. R. R., 23 Ind. 567 (1864).

¹⁰Chamberlain v. Painesville, etc. R. R., 15 Ohio St. 225 (1864); Slipper v. Earhart, 83 Ind. 173 (1882); Evansville, etc. R. R. v. Dunn, 17 Ind. 603 (1861); Keller v. Johnson, 11 Ind. 337 (1858); O'Donald v. Evansville, etc. R. R., 14 Ind. 259 (1860). But not where the note was given by reason of false representations that the condition had been complied with. Parker v.

waiver of the condition to a subscription. Where the condition of a proposition to donate land to a corporation is that a certain amount of stock should be subscribed by responsible parties, the fact that a part of the subscriptions was not by responsible parties cannot be set up, where the party himself subscribed and had not paid.¹ Mere silence may be a waiver;² but payment of part of the subscription,³ or aid in the attempt to start the enterprise, by soliciting subscriptions and being elected to a corporate office, may not amount to a waiver.⁴ It is not a waiver of the performance of the condition that the subscriber brought suit to have the subscription canceled on the ground that he had been induced to subscribe by fraud.⁵ A condition is not waived by partial payment, such payment being made without knowledge that the condition had not been performed.⁶

§ 89. *Notice of performance and calls.*—There is some doubt as to whether, upon performance of the condition, the subscriber is entitled to notice of such performance. The better rule seems to be that he is entitled to such notice, and that a general “call” for the payment of part or all of the subscriptions for stock does not apply to conditional subscribers, unless the condition has been performed, and the fact of performance has been brought to the attention of the subscriber.⁷

Thomas, 19 Ind. 213 (1862); Taylor v. Fletcher, 15 Ind. 80 (1860).

¹ Work v. Welsh, 160 Ill. 468 (1896).

² Burlington, etc. R. R. v. Boestler, 15 Iowa, 555 (1864); Bucksport, etc. R. R. v. Brewer, 67 Me. 295 (1877). In Oregon it is held that where the condition was the subscribing of a certain amount within a certain time, which was not done, but was performed soon after that time, the conditional subscriber is bound, where he did not cause his subscription to be stricken from the books. Lee v. Imbrie, 13 Ore. 510 (1886). Subscribers obtaining stock on condition that a building contract be given to them cannot rescind for non-performance by the company, where the subscribers long delayed rescission, after such refusal of the company to per-

form. Rankin v. Hop, etc. Co., 20 L. T. Rep. 207 (1869). Failure of a subscriber conditionally, for a long time, to have his name taken off the list, renders him liable on the wind-up. Wheatcroft's Case, 29 L. T. 324 (1873).

³ Pittsburgh, etc. R. R. v. Stewart, 41 Pa. St. 54 (1861); Roberts's Case, 2 Macn. & G. 192 (1850); Jewett v. Lawrenceburgh, etc. R. R., 10 Ind. 539 (1858). But see Mack's Appeal, 7 Atl. Rep. 481 (Pa., 1886), where, however, a substantial performance had been made.

⁴ Ridgefield, etc. R. R. v. Reynolds, 46 Conn. 375 (1878).

⁵ Re Thomas, etc. Sons, 77 L. T. Rep. 521 (1897).

⁶ Johnson v. Schar, 70 N. W. Rep. 838 (S. D., 1897).

⁷ Chase v. Sycamore, etc. R. R., 38

Subscriptions payable in property are not subject to calls, and a demand for the property must be made by the corporation.¹ Upon failure of the subscriber to furnish the property, or upon insolvency of the corporation, such subscriptions become payable in cash.²

Ill. 215 (1865); *Trott v. Sarchett*, 10 Ohio St. 241 (1859). *Contra*, *Nichols v. Burlington, etc. Co.*, 4 Greene (Iowa), 42 (1853); *Spartanburg, etc. R. R. v. De Graffenreid*, 12 Rich. L. (S. C.) 675 (1860), holding that no "call" is necessary. An underwriters' agreement to subscribe if called upon so to do does not render them liable on a winding up if they were not so called upon. *Re Harvey's Oyster Co.*, 70 L. T. Rep. 795 (1894). A subscription payable when the road reaches a certain point becomes absolutely payable then, upon demand. The statute of frauds does not apply to such a subscription. *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893).

¹ *Ohio, etc. R. R. v. Cramer*, 23 Ind. 490 (1864). Payment cannot be required in instalments. *Id.* But upon demand the subscriber must ascertain when and where the materials are to be delivered. *McClure v. People's Freight R'y*, 90 Pa. St. 269 (1879).

² *Haywood, etc. Co. v. Bryan*, 6 Jones, L. (N. C.) 82 (1858); *Sperry v. Johnson*, 11 Ohio, 452 (1842); *Wheatcroft's Case*, 29 L. T. Rep. 324 (1873). See n. 2, p. 80, *supra*. *Cf. Dayton, etc. R. R. v. Hatch*, 1 Disney (Ohio), 84 (1855). A subscription on condition of being appointed local manager is not enforceable on the wind-up, the appointment not having been made. *Rogers's Case*, L. R. 3 Ch. App. 633 (1868).

CHAPTER VI.

MUNICIPAL SUBSCRIPTIONS.

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| <p>§ 90. A municipal corporation has no implied power or authority to subscribe for stock in any other corporation.</p> <p>91. The legislature may authorize municipal subscriptions to public but not to private enterprises.</p> <p>92. Constitutional provisions prohibiting municipal subscriptions.</p> <p>93. Change in the state constitution, or the general statutory laws, after the municipal corporation has voted to subscribe.</p> <p>94. Statutory formalities must be substantially complied with.</p> <p>95. Submission to popular vote.</p> | <p>§ 96. What officer or agent of the municipality may make the contract of subscription.</p> <p>97. Municipal subscriptions may be conditional.</p> <p>98. When may a municipal subscription be paid in bonds instead of money?</p> <p>99. A municipal corporation as a stockholder.</p> <p>100. A municipality may enforce delivery of stock to itself in a proper case.</p> <p>101. Division of the municipality after the subscription.</p> <p>102, 103. Consolidation of companies after the municipal aid is voted.</p> |
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§ 90. *A municipal corporation has no implied power or authority to subscribe for stock in any other corporation.*—A municipal corporation, being in its nature and purposes a very different legal institution from an ordinary private corporation, being indeed but a mode or department of government—“an investing the people of a place with the local government thereof,”¹—it is plain that the general rules of law applicable to private corporations having capital stock are, for the most part, not applicable when the rights, duties, powers, and liabilities of municipal corporations are sought to be accurately determined.²

It is proposed to consider the right of a municipality to enter into the contract of subscription to the capital stock of other corporations, and of the liabilities, rights, and duties growing out of such a subscription. The subject practically narrows itself to the right of municipal corporations to subscribe to the

¹Cuddon v. Eastwick, 1 Salk. 183 (1871); State v. Leffingwell, 54 Mo. (1704); Dillon, Mun. Corp., §§ 19, 20. 458 (1873); Norton v. Peck, 3 Wis. 714

²People v. Morris, 13 Wend. 325 (1854); Ottawa v. Carey, 108 U. S. 110 (1885); People v. Hurlbut, 24 Mich. 44 (1883).

stock of railroad corporations, inasmuch as this right, wherever it exists, is almost universally exercised in favor of these corporations, and the adjudicated cases almost all present phases of the question applying to railroad corporations alone.

It is a well-settled rule of law that municipal corporations have no *implied* right or authority to subscribe for the stock of any other incorporated company.¹ In order, therefore, to establish the validity of a municipal subscription to the stock of a railway company, an express grant of authority from the legislature must be shown.² The right to subscribe is derived from

¹ "To become stockholders in private corporations," says Judge Dillon, "is manifestly foreign to the purposes intended to be subserved by the creation of corporate municipalities." Dillon, *Mun. Corp.*, § 161; *Kelley v. Milan*, 127 U. S. 139 (1888). See also *Kenicott v. Supervisors*, 16 Wall. 452 (1872); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Bell v. Railroad Co.*, 4 Wall. 598 (1866); *Wells v. Supervisors*, 102 U. S. 625 (1880); *Lamoille Valley R. R. v. Fairfield*, 51 Vt. 257 (1878); *Barnes v. Lacon*, 84 Ill. 461 (1877), holding that a vote of the people of a town to subscribe for stock without the authorization of law is not binding upon the town. To same effect, *Allen v. Louisiana*, 103 U. S. 80 (1880); *Pennsylvania R. R. v. Philadelphia*, 47 Pa. St. 189 (1864); *Jonesboro v. Cairo, etc. R. R.*, 110 U. S. 192 (1883), holding that a general power to borrow money and issue bonds therefor does not confer the right to subscribe for stock, even with the sanction of the voters at a general election. *Cf. Gelpcke v. Dubuque*, 1 Wall. 175, 220 (1863); *Campbell v. Paris, etc. R. R.*, 71 Ill. 611 (1874); *East Oakland v. Skinner*, 94 U. S. 255 (1876); *Lynchburg v. Slaughter*, 75 Va. 57 (1880); *Brodie v. McCabe*, 33 Ark. 690 (1878). A municipal corporation cannot enforce a penal bond, given to it by a plank-road company, conditioned that the latter will use

to build its road certain bonds issued by the former, it appearing that the aid to the plank-road company was *ultra vires* of the municipality. *Montgomery v. Montgomery, etc. Co.*, 31 Ala. 76 (1857). The attorney-general may restrain a municipality from illegally issuing bonds to a railroad company. *State v. Saline County Court*, 51 Mo. 350 (1873), reviewing the English and American cases.

² *Sharpless v. Philadelphia*, 21 Pa. St. 147 (1853); *Leavenworth County v. Miller*, 7 Kan. 479 (1871). *Cf. Welch v. Post*, 99 Ill. 471 (1881); *Marsh v. Fulton County*, 10 Wall. 676 (1870), holding that the power to subscribe to the stock of a railroad is not sufficient to authorize a subscription to a new incorporation of a part of it; *Lafayette v. Cox*, 5 Ind. 38 (1854); *Dillon, Mun. Corp.*, § 161; *Ottawa v. Carey*, 108 U. S. 110 (1883); *Lewis v. Shreveport*, 108 U. S. 282 (1883). A city has no inherent power to aid a railroad. It cannot do so indirectly by way of a monthly rental for water-works, the water-works company obligating itself to construct the railroad. A lease by a water-works company of its plant to individuals, with an agreement on the part of the company to construct a railroad, the plan being for the individuals to then sublet only the water to the city, the whole scheme being a device to obtain the city aid in the construction

the legislative enactment; and whether or not an enabling act is sufficient to validate a subscription is a question of law for the court, not for the jury.¹

Every holder of municipal bonds issued to raise money to pay such a subscription, whether he receives them directly from the town or county, or from the railroad company to which they may have been delivered, or takes them from some prior holder in the ordinary course of business, is chargeable with notice of the statutory provisions under which they were issued.²

The right to make a donation to a railroad or other work of internal improvement must equally be derived from the act of the legislature. Without such express authority of law, a donation or issue of bonds as a gift to a railroad company is invalid and void.³

§ 91. *The legislature may authorize municipal subscriptions to public but not to private enterprises.*—It was long a question whether the legislature had the constitutional right to authorize a municipality to subscribe money, or donate it, in furtherance of any enterprise not governmental in its nature. It has been contended with great ability and learning that such a right does not inhere in the legislative branch of the government in this country, and consequently that such assumed grants are unconstitutional and void.⁴ But it is now a well-settled rule that the legislature has the constitutional power to authorize a municipal corporation, by its charter or an ex-

of the railroad, is not enforceable. *Higgins v. City of San Diego*, 45 Pac. Rep. 824 (Cal., 1896).

¹ *Post v. Supervisors*, 105 U. S. 667 (1881); *Leavenworth County v. Miller*, 7 Kan. 479 (1871).

² *Ogden v. Daviess County*, 102 U. S. 634 (1880); *Lewis v. Shreveport*, 108 U. S. 282 (1883); *Ottawa v. Carey*, 108 U. S. 110 (1883); *McClure v. Oxford*, 94 U. S. 429 (1876). This is the settled rule of the supreme court of the United States on this point.

³ *Dixon County v. Field*, 111 U. S. 83 (1884).

The power of the legislature to authorize a municipality to donate funds or bonds herein is absolutely

denied in *Hanson v. Vernon*, 27 Iowa, 28 (1869); *Sweet v. Hulbert*, 51 Barb. 312 (1868). Cf. *Leavenworth County v. Miller*, 7 Kan. 479 (1871). The railroad cannot collect, as a donation, money which was voted as a subscription. *Crooks v. State*, 4 N. E. Rep. 589 (Ind., 1886).

A gift of bonds is invalid. So, also, of a subscription payable in bonds where part of the bonds are turned back for the stock. *Post v. Pulaski County*, 49 Fed. Rep. 628 (1892).

⁴ *Cooley*, Const. Lim. (5th ed.), pp. 261-266; *Dillon*, Mun. Corp., §§ 12, 117, 153. For the rule in Michigan, Iowa, and New York, see next note.

press act, to subscribe to the stock of a railroad or other quasi-public corporation, and to issue and sell its bonds for that purpose.¹ The inclination of municipalities to repudiate their

¹ So held by the supreme court of the United States. *Knox County v. Aspinwall*, 21 How. 539 (1858); *Zabriskie v. Cleveland*, etc. R. R., 23 How. 381 (1859); *Amey v. Allegheny City*, 24 How. 364, 376 (1860); *Curtis v. Butler County*, 24 How. 435 (1860); *Gelpcke v. Dubuque*, 1 Wall. 175 (1863); *Mercer County v. Hackett*, 1 Wall. 83 (1863); *Seybert v. Pittsburg*, 1 Wall. 272 (1863); *Van Hostrup v. Madison*, 1 Wall. 291 (1863); *Havemeyer v. Iowa County*, 3 Wall. 294 (1865); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Rogers v. Burlington*, 3 Wall. 654 (1865), holding that power "to borrow money for *any* public purpose" gives authority to borrow to aid a railroad company; *Mitchell v. Burlington*, 4 Wall. 270 (1866); *Von Hoffman v. Quincy*, 4 Wall. 535 (1866); *Campbell v. Kenosha*, 5 Wall. 194 (1866), holding that a subscription may be validated by subsequent legislation, and such validation may be by implication; holding also that the levy of a tax and payment of interest validate bonds irregularly issued; *Meyer v. Muscatine*, 1 Wall. 384 (1863); *Lee County v. Rogers*, 7 Wall. 181 (1868); *Beloit v. Morgan*, 7 Wall. 619 (1868); *Kenosha v. Lamson*, 9 Wall. 477 (1869); *Railroad Co. v. Otoe County*, 16 Wall. 667 (1872); S. C., 1 Dillon, 338 (1871); S. C., *sub nom.* *Chicago*, etc. R. R. v. *Otoe County*, 5 Fed. Cas. 598, holding that, unless restrained by provisions of the constitution of a state, its legislature may authorize a county to issue bonds and *donate* them to the railroad company which will give it a valuable connection with some other region. As to the legislative power, donations and subscriptions for stock stand on the same ground. *Queensbury v. Culver*, 19 Wall. 83 (1873);

Woods v. Lawrence County, 1 Black, 386 (1861), holding that where, by statute, the grand jury of a county is required to fix the amount of the subscription, their act in pursuance thereof cannot afterwards be questioned by the county as to such amount; and if payment is to be made as may be agreed upon, an issue of bonds for that purpose is binding upon the county; *Gilman v. Sheboygan*, 2 Black, 510 (1862), holding that a statute authorizing a city to borrow money, and to tax property to pay it, does not constitute such a contract with the bondholders that the state cannot afterwards modify the taxation even by the exemption of portions of taxable property; *Olcott v. Supervisors*, 16 Wall. 678 (1872); *Rock Creek v. Strong*, 96 U. S. 271 (1877); *Seven Hickory v. Ellery*, 103 U. S. 423 (1880); *Clay County v. Society for Savings*, 104 U. S. 579 (1881); *Taylor v. Ypsilanti*, 105 U. S. 60 (1881); *Lewis v. Barbour County*, 105 U. S. 739 (1881); *Amoskeag Bank v. Ottawa*, 105 U. S. 667 (1881); *Gilman v. Sheboygan*, 2 Black, 510; *Scipio v. Wright*, 101 U. S. 665 (1879). And in the circuit and district courts of the United States. *Long v. New London*, 9 Biss. 539 (1880); S. C., 5 Fed. Rep. 559; *Sibley v. Mobile*, 3 Woods, 535 (1876); S. C., 22 Fed. Cas. 57; U. S. v. *New Orleans*, 2 Woods, 230 (1876); S. C., 27 Fed. Cas. 131.

Alabama: *Stein v. Mobile*, 24 Ala. 591 (1854); *Opelika v. Daniel*, 59 Ala. 211 (1877); *Ex parte Selma*, etc. R. R., 45 Ala. 696 (1871); *Gibbons v. Mobile*, etc. R. R., 36 Ala. 410 (1860).

Arkansas: *Mississippi*, etc. R. R. v. *Camden*, 23 Ark. 300 (1861); *English v. Chicot County*, 26 Ark. 454 (1871); *Jacksonport v. Watson*, 33 Ark. 704

obligations after receiving the benefits of those obligations has been thwarted by the courts. And the result is a satisfactory

(1878); *Chicot County v. Sherwood*, 148 U. S. 529 (1893).

California: *Robinson v. Bidwell*, 22 Cal. 379 (1863); *People v. Coon*, 25 Cal. 635 (1864); *Napa Valley R. R. v. Napa County*, 30 Cal. 435 (1866); *Stockton, etc. R. R. v. Stockton*, 41 Cal. 147 (1871).

Colorado: *People v. Pueblo County*, 2 Colo. 360 (1874); *Chaffee County v. Potter*, 142 U. S. 355 (1892).

Connecticut: *Bridgeport v. Housatonic R. R.*, 15 Conn. 475 (1843), holding that a subscription made by a city without authority may be made valid by subsequent legislative action; in this case the validating statute was passed upon the application of the city making the subscription; *Beardsley v. Smith*, 16 Conn. 368 (1844); *Society for Savings v. New London*, 29 Conn. 174 (1860); *Douglas v. Chatham*, 41 Conn. 211 (1874).

Florida: *Cotten v. Leon County*, 6 Fla. 610 (1856).

Georgia: *Winn v. Macon*, 21 Ga. 275 (1857); *Powers v. Inferior Court of Dougherty County*, 23 Ga. 65 (1857).

Illinois: *Shaw v. Dennis*, 10 Ill. 405 (1849); *Prettyman v. Tazewell County*, 19 Ill. 406 (1858), holding that an injunction on the ground of fraud at an election authorizing a subscription will not be granted to one who delays until others have acted upon the faith that the municipal corporation will aid an enterprise; *Robertson v. Rockford*, 21 Ill. 451 (1859); *Schuyler County v. People*, 25 Ill. 181 (1860); *Butler v. Dunham*, 27 Ill. 474 (1861); *Dunnovan v. Green*, 57 Ill. 63 (1870); *Madison County v. People*, 58 Ill. 456 (1871); *Chicago, etc. R. R. v. Smith*, 62 Ill. 268 (1871); *Decker v. Hughes*, 68 Ill. 33 (1873); *Quincy, etc. R. R. v. Morris*, 84 Ill. 410 (1877); *Chicago, etc. R. R. v. Aurora*, 99 Ill. 205 (1881); *Olcott v. Supervisors*, 16 Wall.

678 (1872). But see *Weightman v. Clark*, 103 U. S. 256 (1880).

Indiana: *Aurora v. West*, 9 Ind. 74 (1857); *S. C.*, 22 Ind. 88 (1864); *Evansville, etc. R. R. v. Evansville*, 15 Ind. 395 (1860); *Bartholomew County v. Bright*, 18 Ind. 93 (1862); *Thompson v. Peru*, 29 Ind. 305 (1868); *Lafayette, etc. R. R. v. Geiger*, 34 Ind. 185 (1870); *John v. Cincinnati, etc. R. R.*, 35 Ind. 539 (1871); *Crawford County v. Louisville, etc. R'y*, 39 Ind. 192 (1872); *Mount Vernon v. Hovey*, 52 Ind. 563 (1876); *Indiana, etc. R'y v. Attica*, 56 Ind. 476 (1877); *Williams v. Hall*, 65 Ind. 129 (1879); *Bittinger v. Bell*, 65 Ind. 445 (1879); *Brokaw v. Gibson County*, 73 Ind. 543 (1881); *Peed v. Millikan*, 79 Ind. 86 (1881).

Iowa: "In Iowa, up to 1858, it was held that such acts were constitutional; but from that time up to 1869 they were held to be unconstitutional, when the court seems to have undergone a radical change, and from that time to the present the constitutionality of such measures has been sustained." *Wood, Railw.* (1st ed.), p. 264, citing *Dubuque County v. Dubuque, etc. R. R.*, 4 Greene, 1 (1853); *State v. Bissell*, 4 Greene, 328 (1854); *Clapp v. Cedar County*, 5 Iowa, 15 (1857); *McMillen v. Lee County*, 6 Iowa, 391 (1858). The above authorities, prior to 1858, hold these acts constitutional, as do the following, since 1869: *Stewart v. Polk County*, 30 Iowa, 9 (1870); *Bonfield v. Bidwell*, 32 Iowa, 149 (1871); *Jordon v. Hayne*, 36 Iowa, 9 (1872); *Muscatine, etc. R. R. v. Horton*, 38 Iowa, 33 (1873); *Wapello County v. Burlington, etc. R. R.*, 44 Iowa, 585 (1876); *McMillen v. Boyles*, 6 Iowa, 304 (1858); *Games v. Robb*, 8 Iowa, 193 (1859); *Chamberlain v. Burlington*, 19 Iowa, 395 (1865), holding that a charter authorizing a city to bor-

one. Any other decision would have checked the growth of the country, unsettled investments, and brought upon Ameri-

row money for "any public purpose" does not confer power to aid in constructing a railroad; particularly *King v. Wilson*, 1 Dillon, 555 (1871); S. C., 14 Fed. Cas. 563, as to how far the federal courts will follow the state courts as to the constitutionality of such statutes; while the following cases, decided between 1858 and 1869, hold such acts unconstitutional and void: *Stokes v. Scott County*, 10 Iowa, 166 (1859); *State v. Wapello County*, 13 Iowa, 388 (1862); *Myers v. Johnson County*, 14 Iowa, 47 (1862). See also, in general, *Doon v. Cummins*, 142 U. S. 366 (1892).

Kansas: *Atchison v. Butcher*, 3 Kan. 104 (1865); *Leavenworth County v. Miller*, 7 Kan. 479 (1871); *Southern Kansas, etc. R. R. v. Townner*, 41 Kan. 72 (1889); *Morris v. Morris County*, 7 Kan. 576 (1871); *State v. Nemaha County*, 7 Kan. 542 (1871); *Burnes v. Atchison*, 2 Kan. 454 (1864); *Leavenworth, etc. R. R. v. Douglas County*, 18 Kan. 169 (1877); *Turner v. Woodson County*, 27 Kan. 314 (1882), holding that, where the amount of bonds voted to be issued was in excess of the amount which a township might legally issue, the vote was a nullity only as to the excess. *Kansas City, etc. R. R. v. Rich Township*, 45 Kan. 275 (1891); *Hutchinson, etc. R. R. v. Kingman County*, 48 Kan. 70 (1892).

Kentucky: *Talbot v. Dent*, 9 B. Mon. 526 (1849); *Slack v. Maysville, etc. R. R.*, 13 B. Mon. 1 (1852); *Maddox v. Graham*, 2 Metc. (Ky.) 56 (1859); *Shelby County Court v. Cumberland, etc. R. R.*, 8 Bush (Ky.), 209 (1871), holding that a subscription not authorized by law may be validated by later legislation; *Allison v. Louisville, etc. R. R.*, 10 Bush, 1 (1873); *Christian County Court v. Smith*, 12 S. W. Rep. 134 (Ky., 1889); on rehearing, 13 S. W. Rep. 276. A railroad cannot be taxed

to aid in paying a municipal subscription to its construction. *Louisville, etc. R. R. v. Commonwealth*, 89 Ky. 531 (1890); *Brown v. Tinsley*, 21 S. W. Rep. 535 (Ky., 1893).

Louisiana: *Police Jury v. McDonogh*, 8 La. Ann. 341 (1853); *Parker v. Scogin*, 11 La. Ann. 629 (1856). *Cf. Wilson v. Shreveport*, 29 La. Ann. 673 (1877). Municipal-aid bond case. *Reynolds, etc. Co. v. Monroe*, 45 La. Ann. 1024 (1893).

Maine: *Augusta Bank v. Augusta*, 49 Me. 507 (1860); *Stevens v. Anson*, 73 Me. 489 (1882). A town may maintain a bill in equity against many bondholders to compel them to deliver up their bonds as having been illegally issued in aid of a railroad. *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46 (1892).

Massachusetts: *Portage County v. Wisconsin Cent. R. R.*, 121 Mass. 460 (1877), holding that the legislature of *Wisconsin* has power to authorize counties to subscribe for stock in aid of railroads and to issue bonds therefor.

Michigan: In Michigan the courts hold that statutes authorizing municipal corporations to subscribe to the stock of a railroad or vote bonds to it are void, and the subscription and bonds are void. *People v. Salem*, 20 Mich. 452 (1870); *Thomas v. Port Huron*, 27 Mich. 320 (1873); *People v. State Treasurer*, 23 Mich. 499 (1871); *People v. Detroit*, 28 Mich. 228 (1873). But see *Talcott v. Pine Grove*, 1 Flip. (U. S.) 120 (1872); S. C., 23 Fed. Cas. 652, where the position taken by the court of Michigan was held to be so contrary to precedent and so unexpected as to operate as a surprise upon the community; S. C. affirmed, *sub nom. Pine Grove v. Talcott*, 19 Wall. 666 (1873), which was adhered to in *Taylor v. Ypsilanti*, 105 U. S. 60

can municipalities the disgrace and disastrous loss of credit which arise from repudiation.

(1881). See also *Chickaming v. Carpenter*, 106 U. S. 663 (1882). Where the issue of municipal bonds in aid of a railroad is illegal, as in Michigan, the law cannot be evaded by issuing bonds nominally for public improvements, but really in aid of a railroad. *Risley v. Howell*, 57 Fed. Rep. 544 (1893).

Minnesota: *Davidson v. Ramsey Co.*, 18 Minn. 432 (1872); *State v. Clark*, 23 Minn. 422 (1877); *Kimball v. Lakeland*, 41 Fed. Rep. 289 (1890).

Mississippi: *Strickland v. Railroad Co.*, Miss. MSS., cited in 1 Dillon, Mun. Corp. (4th ed.), p. 225, n.; *New Orleans, etc. R. R. v. McDonald*, 53 Miss. 240 (1876); *Wells v. Supervisors*, 102 U. S. 625 (1880); *Madison County v. Priestly*, 42 Fed. Rep. 817 (1890); *Barnum v. Okolona*, 148 U. S. 393 (1893).

Missouri: *St. Louis v. Alexander*, 23 Mo. 483 (1856); *St. Joseph, etc. R. R. v. Buchanan County Court*, 39 Mo. 485 (1867); *State v. Macon County Court*, 41 Mo. 453 (1867); *Chillicothe, etc. R. R. v. Brunswick*, 44 Mo. 553 (1869); *State v. Linn Co.*, 44 Mo. 504 (1869); *State v. Sullivan County Court*, 51 Mo. 522 (1873); *Osage Valley, etc. R. R. v. Morgan County Court*, 53 Mo. 156 (1873); *Smith v. Clark County*, 54 Mo. 58 (1873); *State v. Green County*, 54 Mo. 540 (1874); *State v. Hannibal, etc. R. R.*, 101 Mo. 136 (1890).

Nebraska: *Hallenbeck v. Hahn*, 2 Neb. 377 (1873); *Reineman v. Covington, etc. R. R.*, 7 Neb. 310 (1878), holding that, if a county votes aid to a railroad in excess of the sum allowed by the law, such act is void and will not authorize the issue of any bonds whatever; *Railroad Co. v. Otoe County*, 16 Wall. 667 (1872); *Dixon County v. Field*, 111 U. S. 83 (1884). In Nebraska a failure to construct the road in the municipality, and the

construction of the road by a vendee, are both fatal. *Midland Township v. Gage County*, 37 Neb. 582 (1893). If voters have been induced to favor bonds by false and fraudulent representations, a court of equity will enjoin the delivery. *Nash v. Baker*, 37 Neb. 713 (1893).

Nevada: *Gibson v. Mason*, 5 Nev. 283 (1869); *Lincoln County v. Luning*, 133 U. S. 529 (1890).

New Hampshire: *Perry v. Keene*, 56 N. H. 514 (1876).

New Jersey: *Bernards Township v. Morrison*, 133 U. S. 523 (1890).

New York: In New York the courts have unwillingly sustained the validity of such grants. *Clarke v. Rochester*, 28 N. Y. 605 (1864); *Grant v. Courter*, 24 Barb. 232 (1857); *Benson v. Albany*, 24 Barb. 248 (1857); *People v. Henshaw*, 61 Barb. 409 (1870); *Ex parte Taxpayers of Kingston*, 40 How. Pr. 444 (1870); *Gould v. Oneonta*, 71 N. Y. 298 (1877); *Sweet v. Hulbert*, 51 Barb. 312 (1868), denying the constitutionality of a donation of bonds. Cf. *People v. Batchellor*, 53 N. Y. 128 (1873), holding that a municipal corporation cannot be compelled by the legislature, against its consent and that of its taxpayers, to become a stockholder in a corporation which is private in character (as here, a railroad)—a statute for such a purpose is void; *Queensbury v. Culver*, 19 Wall. 83 (1873), in which the New York doctrine is denied by the supreme court of the United States.

But the law is clear, in New York, that such statutes and subscriptions thereunder are constitutional. *Bank of Rome v. Rome*, 18 N. Y. 38 (1858); *Starin v. Genoa*, 23 N. Y. 439 (1861); *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122 (1889); *Alvord v. Syracuse Sav. Bank*, 98 N. Y. 599 (1885), holding that the legislature may give

The act of the legislature authorizing a municipal subscription, however, will not avail to validate such a contract, unless it is duly passed in accordance with all the constitutional formal-

to the bonds a negotiability which is not given to them by the court; *Craig v. Andes*, 93 N. Y. 405 (1883), holding that bonds, even in *bona fide* hands, are void where part of the consents thereto were conditional, even though the bond recites that all legal steps to comply with the law were taken; *Lyons v. Chamberlain*, 89 N. Y. 578 (1882), where the person to whom illegal bonds were issued was held to account for them; *Cagwin v. Hancock*, 84 N. Y. 532 (1881), holding that the town may set up that a majority did not vote for the issue of the bonds; that the federal decisions will not be followed; that an innocent holder is not protected, and that "the bonding acts are now regarded as hostile to a sound public policy;" *Springport v. Teutonia Sav. Bank*, 84 N. Y. 403 (1881), also holding that the affidavit of assessors as to the vote is only *prima facie* evidence. To same effect see *Dodge v. Platte County*, 82 N. Y. 218 (1880), declaring void certain Missouri municipal bonds; *Duanesburgh v. Jenkins*, 57 N. Y. 177 (1874), sustaining the constitutionality of bonding acts and reviewing the New York cases; *People v. Mitchell*, 35 N. Y. 551 (1866); *S. C.*, 45 Barb. 208 (1865); *People v. Spencer*, 55 N. Y. 1 (1873); *Williams v. Duanesburgh*, 66 N. Y. 129 (1876); *Horton v. Thompson*, 71 N. Y. 513 (1878); affirmed in *Scipio v. Wright*, 101 U. S. 665 (1879). In New York an effectual remedy against the illegal bonding of a town in aid of a railroad is found in holding liable to the town the parties who promoted the aid, for all sums paid by the town to *bona fide* holders of the bonds. *Farnham v. Benedict*, 107 N. Y. 159 (1887). A suit in equity to cancel illegal municipal bonds does not lie,

except where the defendant fails to allege that there is a remedy at law. *Mentz v. Cook*, 108 N. Y. 504 (1888). Long delay may bar the right of a municipality to have such bonds canceled. *Calhoun v. Millard*, 121 N. Y. 69 (1890). See also, in general, *Solon v. Williamsburgh, etc. Bank*, 114 N. Y. 122 (1889); *Brownell v. Greenwich*, 114 N. Y. 518 (1889).

North Carolina: *Taylor v. Newberne*, 2 Jones, Eq. 141 (1855); *Caldwell v. Burke County*, 4 Jones, Eq. 323 (1858); *Hill v. Forsyth County*, 67 N. C. 367 (1870); *Wood v. Oxford*, 97 N. C. 227 (1887); *McDowell v. Massachusetts, etc. Co.*, 96 N. C. 514 (1887); *Goforth v. Rutherford, etc. Co.*, 96 N. C. 535 (1887).

Ohio: *Cincinnati, etc. R. R. v. Clinton County*, 1 Ohio St. 77 (1852); *Steu-benville, etc. R. R. v. North Township*, 1 Ohio St. 105 (1852); *Cass v. Dillon*, 2 Ohio St. 607 (1853); *Thompson v. Kelly*, 2 Ohio St. 647 (1853); *State v. Union Township*, 8 Ohio St. 394 (1858); *State v. Hancock County*, 11 Ohio St. 183 (1860); *Knox County v. Nichols*, 14 Ohio St. 260 (1863); *State v. Perrysburg*, 14 Ohio St. 472 (1863); *State v. Goshen*, 14 Ohio St. 569 (1863); *Walker v. Cincinnati*, 21 Ohio St. 14 (1871); *S. C.*, 1 Cin. 121 (1871).

Pennsylvania: *Com'th v. McWilliams*, 11 Pa. St. 61 (1849); *Brown v. Commissioners*, 21 Pa. St. 37 (1853); *Sharpless v. Philadelphia*, 21 Pa. St. 147 (1853); *Moers v. Reading*, 21 Pa. St. 188 (1853); *Com'th v. Allegheny County*, 32 Pa. St. 218 (1858); *Com'th v. Pittsburgh*, 34 Pa. St. 496 (1859); *Com'th v. Pittsburgh*, 41 Pa. St. 278 (1861); *Com'th v. Perkins*, 43 Pa. St. 400 (1862); *Pennsylvania R. R. v. Philadelphia*, 47 Pa. St. 189 (1864); *Riddle v. Philadelphia, etc. R. R.*, 1 Pittsb. (Pa.) 158 (1854); *Armstrong*

ities;¹ and after a subscription is made, any act of the legislature restricting or abridging the taxing power so as to deprive the municipality of the power to pay the bonds is unconstitutional and void.² In California the courts go even to the extent of holding that the legislature may compel a municipality to subscribe to the stock of a railway company and to issue its bonds in payment thereof.³ But this extreme view is disapproved in New York⁴ and in Illinois,⁵ the courts in these states taking the better ground that, while it is competent for the

County *v.* Brinton, 47 Pa. St. 367 (1864).

South Carolina: State *v.* Charleston County, 10 Rich. L. 491 (1857); Lancaster County *v.* Cheraw, etc. R. R., 28 S. C. 134 (1888); State *v.* Whitesides, 30 S. C. 579 (1889); Floyd *v.* Perrin, 30 S. C. 1 (1888).

Tennessee: City, etc. *v.* Charleston, etc. R. R., 44 S. W. Rep. 670 (Tenn., 1897); Taxpayers of Milan *v.* Tennessee, etc. R. R., 11 Lea, 329 (1883); Wilson County *v.* Nat. Bank, 103 U. S. 770 (1880); Nichol *v.* Nashville, 9 Humph. 252 (1848); Louisville, etc. R. R. *v.* Davidson County Court, 1 Sneed, 637 (1854); Williams *v.* Duck River, etc. R. R., 9 Baxt. 488 (1876); Clay *v.* Hawkins County, 5 Lea, 137 (1880); Lauderdale County *v.* Fargason, 7 Lea, 153 (1881); Winston *v.* Tennessee, etc. R. R., 1 Baxt. 60 (1873).

Texas: San Antonio *v.* Jones, 28 Tex. 19 (1866); San Antonio *v.* Lane, 32 Tex. 405 (1869); San Antonio *v.* Gould, 34 Tex. 49 (1870).

Vermont: Bennington *v.* Park, 50 Vt. 178 (1877); First Nat. Bank *v.* Concord, 50 Vt. 257 (1877).

Virginia: Goddin *v.* Crump, 8 Leigh, 120 (1837); Cumberland County *v.* Randolph, 89 Va. 614 (1893). See also Goshorn *v.* Ohio County, 1 W. Va. 308 (1865).

Wisconsin: State *v.* Common Council, 71 N. W. Rep. 86 (Wis., 1897); Clark *v.* Janesville, 10 Wis. 136 (1860); Bushnell *v.* Beloit, 10 Wis. 195 (1860); Foster *v.* Kenosha, 12 Wis. 616 (1860);

Veeder *v.* Lima, 19 Wis. 280 (1865); Fisk *v.* Kenosha, 26 Wis. 23 (1870); Phillips *v.* Albany, 28 Wis. 340 (1871); Rogan *v.* Watertown, 30 Wis. 259 (1872); Lawson *v.* Milwaukee, etc. R. R., 30 Wis. 597 (1872); Oleson *v.* Green Bay, etc., 36 Wis. 383 (1874). Cf. Whiting *v.* Sheboygan, etc. R. R., 25 Wis. 167 (1870). Municipal gift of land to a railroad. Northern Pac. R. R. *v.* Roberts, 42 Fed. Rep. 734 (1890). A county cannot donate land to a railroad. Ellis *v.* Northern, etc. R. R., 77 Wis. 114 (1890).

The leading cases upon the constitutionality of statutes authorizing municipal subscription to railroads are Goddin *v.* Crump, 8 Leigh (Va.), 120 (1837)—which is said by Judge Dillon to be the first in the long series; Leavenworth County *v.* Miller, 7 Kan. 479 (1871); Slack *v.* Maysville, etc. R. R., 13 B. Mon. (Ky.) 1 (1852); Knox Co. *v.* Aspinwall, 21 How. (U. S.) 539 (1858); Sharpless *v.* Mayor, 21 Pa. St. 147 (1853).

¹ Amoskeag Bank *v.* Ottawa, 105 U. S. 667 (1881).

² Wolff *v.* New Orleans, 103 U. S. 358 (1880). Cf. Edwards *v.* Williamson, 70 Ala. 145 (1881); Hays *v.* Dowis, 75 Mo. 250 (1881).

³ Napa Valley R. R. *v.* Napa County, 30 Cal. 435 (1866).

⁴ People *v.* Batchellor, 53 N. Y. 128 (1873). Cf. Queensburg *v.* Culver, 19 Wall. (U. S.) 82 (1873).

⁵ Cairo, etc. R. R. *v.* Sparta, 77 Ill. 505 (1875).

legislature to authorize a municipal subscription in a proper case, there is no power anywhere to compel such a subscription or donation.

While it may be conceded that, from a constitutional standpoint as well as from that of public policy and expediency, there are grave objections to the existence or exercise of this power, which has plainly been monstrosly abused,¹ it is clear that the courts, almost universally, as has been shown, have taken and will continue to hold the most liberal views as to the legislative prerogative in this respect. Such authority inhering in the legislature is generally conceded.

A municipality which has not yet been incorporated cannot hold an election and vote a subscription for stock. The subscription is void.² But a *de facto* municipal corporation recognized by the legislature cannot defeat its bonds by alleging irregular incorporation.³ It is no objection to the validity of the legislative act, or the municipal subscription, that the subscription is made to a railroad company not yet in existence,⁴ or to the company that first builds the road.⁵

It must not be overlooked, however, that municipalities never have the power, by virtue of any of these legislative enactments, to tax themselves for the benefit of enterprises or objects which are private in their nature. Municipal subscriptions can only be made to the stock of companies of an essentially public character. This is a rule conclusively settled and plainly statutory.⁶

¹ Dillon, *Mun. Corp.*, §§ 12, 117, 157; Cooley, *Const. Lim.*, pp. 261 *et seq.*

² *Clark v. Janesville*, 13 Wis. 414 (1861); *S. C.*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 432 (1861); *Berliner v. Waterloo*, 14 Wis. 378 (1861). See *Lewis v. Clarendon*, 5 Dillon, 329 (1878); *S. C.*, 15 Fed. Cas. 474, to the effect that, if authority is given "to any incorporated town or city" to subscribe for stock, it is not limited to such towns as are incorporated when the act was passed.

³ *Comanche County v. Lewis*, 133 U. S. 198 (1890).

⁴ In *Daviess County v. Huidekoper*, 98 U. S. 98 (1878), it is held that county bonds in the hands of a *bona fide*

holder for value are not rendered void by the fact that, at the time the vote authorizing the subscription was taken, the company to be benefited was not created according to law. To same effect, *James v. Milwaukee*, 16 Wall. 159 (1872); *Railroad Co. v. Falconer*, 103 U. S. 821 (1880). *Contra*, *Rubey v. Shain*, 54 Mo. 207 (1873); *People v. Franklin*, 5 Lans. (N. Y.) 129 (1871); *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (1875).

⁵ *North v. Platte County*, 29 Neb. 447 (1890).

⁶ *Loan Assoc. v. Topeka*, 20 Wall. 655 (1874); *Weismer v. Douglas*, 64 N. Y. 91 (1876); *Bissell v. Kankakee*, 64 Ill. 249 (1872); *Brewer Brick Co. v.*

Questions involving the distinction between public and private uses are constantly arising when the validity of municipal bonds is the issue, and the courts adhere to the rule that municipal aid can lawfully be extended only to railroads or other enterprises of a distinctly public or quasi-public character.¹ A mu-

Brewer, 62 Me. 62 (1873); *Allen v. Jay*, 60 Me. 124 (1873); *Lowell v. Boston*, 111 Mass. 454 (1873); *State v. Osawakee*, 14 Kan. 418 (1875); *McConnell v. Hamm*, 16 Kan. 228 (1876); *Union Pac. R. R. v. Smith*, 23 Kan. 745 (1880); *Clark v. Des Moines*, 19 Iowa, 199 (1865); *Frederick v. Augusta*, 5 Ga. 561 (1848); *Commercial Nat. Bank v. Iola*, 2 Dill. 353 (1873); S. C., 6 Fed. Cas. 221; *Citizens' Sav. Assoc. v. Topeka*, 3 Dill. 376 (1874); S. C., 5 Fed. Cas. 737. *Cf.* *Bloodgood v. Mohawk*, etc. R. R., 18 Wend. 9, 65 (1837); *Chapman v. Gates*, 54 N. Y. 132, 144 (1873); *Osborne v. Adams County*, 109 U. S. 1 (1883); S. C., 106 U. S. 181 (1882); *Ottawa v. Carey*, 108 U. S. 110 (1883); *Freeland v. Hastings*, 92 Mass. 570 (1865); *Jenkins v. Andover*, 103 Mass. 94 (1869); *People v. Salem*, 20 Mich. 452 (1870); *Curtis v. Whipple*, 24 Wis. 350 (1869); *Cook v. Sumner Spinning, etc. Co.*, 1 Sneed (Tenn.), 698 (1854); *Cooley*, Const. Lim. (5th ed.) p. 261.

¹ A municipal donation to a private manufacturing concern is void. *Cole v. La Grange*, 113 U. S. 1 (1884). Aid to bridge-manufacturing and iron-works company held void. *Loan Assoc. v. Topeka*, 20 Wall. 655 (1874). Same as to hydraulic works. *Weisner v. Douglas*, 64 N. Y. 91 (1876). Also to linen company. *Bissell v. Kankakee*, 64 Ill. 249 (1872). Also exempting manufacturing companies from taxes for ten years. *Brewer Brick Co. v. Brewer*, 62 Me. 62 (1873). Also loan of credit to saw-mill and box-factory. *Allen v. Jay*, 60 Me. 124 (1873). Also loan to persons rebuilding after a fire. *Lowell v. Boston*, 111 Mass. 454 (1873). Or to relieve the

destitute poor. *State v. Osawakee*, 14 Kan. 418 (1875). Or to aid in constructing a woolen-mill. *McConnell v. Hamm*, 16 Kan. 228 (1876). Or to build a dam. *Union Pac. R. R. v. Smith*, 23 Kan. 745 (1880). Or to construct a toll-bridge. *Clark v. Des Moines*, 19 Iowa, 199 (1865). To aid a company which manufactures bridges, plows, stoves, etc. *Commercial Nat. Bank v. Iola*, 2 Dill. 353 (1873); S. C., 6 Fed. Cas. 221; *Citizens' Sav. Assoc. v. Topeka*, 3 Dill. 376 (1874); S. C., 5 Fed. Cas. 737. *Cf.* *Bloodgood v. Mohawk*, etc. R. R., 18 Wend. 9, 65 (1837); *Chapman v. Gates*, 54 N. Y. 132, 144 (1873). Or to aid a steam grist-mill. *Osborne v. Adams County*, 109 U. S. 1 (1883); S. C., 106 U. S. 181 (1882). Or to aid the development of a water-power. *Ottawa v. Carey*, 108 U. S. 110 (1883). Or to repay to persons money paid by them for substitutes in the army. *Freeland v. Hastings*, 92 Mass. 570 (1865). As to tax for a school-house, see *Jenkins v. Andover*, 103 Mass. 94 (1869). As to payment of money on account of drafting of soldiers, see *Thompson v. Pittston*, 59 Me. 545 (1871); *Tyson v. Halifax*, 51 Pa. St. 9 (1865). Aid to a private school is void (*Curtis v. Whipple*, 24 Wis. 350—1869); or to a manufacturing company. *Cook v. Sumner Spinning, etc. Co.*, 1 Sneed (Tenn.), 698 (1854); *Cooley*, Const. Lim., 5th ed., p. 263 *et seq.* A municipality has no power to invest in the stock of a steamship company (*Pennsylvania R. R. v. Philadelphia*, 47 Pa. St. 189—1864); nor to operate free ferries (*Jacksonport v. Watson*, 33 Ark. 704—1878); but a subscription to a turnpike company has been held

nicipal corporation may be authorized by the legislature to build irrigation ditches, the cost thereof to be defrayed by taxation.¹

§ 92. *Constitutional provisions prohibiting municipal subscriptions.*—The unchecked exercise of this power on the part of the state legislatures has entailed upon the people of the states such a burden of taxation² that in many states are found constitutional prohibitions rendering it unlawful for municipal corporations to make subscriptions or lend their credit to any incorporated company or enterprise, not strictly and exclusively governmental in its nature and constitution. This is the case in Pennsylvania,³ Ohio,⁴ Illinois,⁵ New York,⁶ Indiana,⁷ Missouri,⁸ Mississippi,⁹ and in some other states.¹⁰ In general it will

legal. *Clark v. Leathers*, 5 S. W. Rep. 576 (Ky., 1887). And to obtain a water-supply. *Frederick v. Augusta*, 5 Ga. 561 (1848). See 86 Fed. Rep. 597.

¹ *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112 (1896).

² *Dillon*, Mun. Corp., §§ 156, 160. The sum of municipal indebtedness in this country is said to exceed one thousand millions of dollars, and the amount is constantly increasing.

³ Amend. to Const. 1857, § 7, art. II; *Pennsylvania R. R. v. Philadelphia*, 47 Pa. St. 189 (1864).

⁴ Const., art. XVIII, § 6; *Walker v. Cincinnati*, 21 Ohio St. 14 (1871); *Cass v. Dillon*, 2 Ohio St. 607 (1853); *State v. Perrysburg*, 14 Ohio St. 472 (1863); *Thompson v. Kelly*, 2 Ohio St. 647 (1853); *Wyscaver v. Atkinson*, 37 Ohio St. 80 (1881).

⁵ Const. 1870; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (1875); *Louisville v. Savings Bank*, 104 U. S. 469 (1881); *Harter v. Kernochan*, 103 U. S. 562 (1880); *Fairfield v. Gallatin County*, 100 U. S. 47 (1879); *Chicago, etc. R. R. v. Pinckney*, 74 Ill. 277 (1874); *Moultrie County v. Rockingham, etc. Bank*, 92 U. S. 631 (1875); *Robertson*

v. Rockford, 21 Ill. 451 (1859). The constitutional prohibition in Illinois against lending credit applies to the state only, and not to counties or cities.

⁶ Amend. Const., Jan. 1, 1875; *People v. Fort Edward*, 70 N. Y. 28 (1877); *Dodge v. Platte County*, 82 N. Y. 218 (1880), reversing S. C., 16 Hun, 285.

⁷ Const., art. X, § 10; *Lafayette, etc. R. R. v. Geiger*, 34 Ind. 185 (1870); *John v. Cincinnati, etc. R. R.*, 35 Ind. 539 (1871); *Aspinwall v. Jo Daviess County*, 22 How. (U. S.) 364 (1859); *Brokaw v. Gibson County*, 73 Ind. 543 (1881).

⁸ Const., art. XI, § 14; *Schuyler County v. Thomas*, 98 U. S. 169 (1878); *Smith v. Clark County*, 54 Mo. 58 (1873); *Macon County v. Shores*, 97 U. S. 272 (1877); *Ray County v. Vansycle*, 96 U. S. 675 (1877); *Scotland County v. Thomas*, 94 U. S. 682 (1876).

⁹ Const., art. XII, § 14; *Calhoun County v. Galbraith*, 99 U. S. 214 (1878); *Hayes v. Holly Springs*, 114 U. S. 120 (1885); *Grenada County v. Brogden*, 112 U. S. 261 (1884). Cf. *State v. Young*, 29 Minn. 474 (1881). Where municipal-aid bonds were is-

¹⁰ See Part VII, *infra*. Where the statutes limit the amount of debt which a county may incur in aid of railroads, and aid is voted to the full

amount, subsequent aid is void. *Chicago, etc. R. R. v. Osage County*, 38 Kan. 597 (1888).

be found that these constitutional provisions forbid in terms any subscription or lending of credit by any municipality in the state, or by the state itself, to any company, association, or corporation whatsoever. Sometimes the prohibition is absolute, and at other times two-thirds or a majority of the qualified electors of the municipality must vote to render such aid. The constitutional or statutory provisions which prohibit municipal subscriptions are construed to be prospective only, unless they contain express words making them retroactive.¹ This principle is frequently applied when the constitutional enactment is

sued under an unconstitutional statute, but are enforced by the United States courts in favor of *bona fide* holders, the municipality may recover back from the railroad company or its successor the amounts so paid to such *bona fide* holders. *Plainview v. Winona, etc. R. R.*, 36 Minn. 505 (1887). In *Walker v. Cincinnati*, 21 Ohio St. 14 (1871), the building of the Cincinnati Southern Railway by the city of Cincinnati was held legal, notwithstanding the state constitution forbade the legislature from authorizing any city, etc., becoming a "stockholder in any joint-stock company, corporation, or association whatever."

¹ *Moultrie County v. Rockingham, etc. Bank*, 92 U. S. 631 (1875); *Grenada County v. Brogden*, 112 U. S. 261 (1884); *Fairfield v. Gallatin County*, 100 U. S. 47 (1879); *Randolph County v. Post*, 93 U. S. 502 (1876); *Ralls County v. Douglass*, 105 U. S. 728 (1881); *Henry County v. Nicolay*, 95 U. S. 619 (1877), holding that when authority had been granted to a county in Missouri to subscribe, the power was not subject to a constitutional amendment requiring the assent of two-thirds of the voters of the county; *Cass County v. Gillett*, 100 U. S. 585 (1879), following and approving last case; *Callaway County v. Foster*, 93 U. S. 567 (1876), to same effect, same constitution; *Louisiana v. Taylor*, 105 U. S. 454 (1881), to same effect, same constitution; *Durkee v.*

Board of Liquidation, 103 U. S. 646 (1880); *Howard County v. Paddock*, 110 U. S. 384 (1884); *Dallas County v. McKenzie*, 110 U. S. 686 (1884). The legislature cannot, after the adoption of a constitutional amendment prohibiting municipalities from voting aid, remedy defects in votes taken before the amendment was adopted. *Katzenberger v. Aberdeen*, 121 U. S. 172 (1887); *Decker v. Hughes*, 68 Ill. 33 (1873), holding that, where a new state constitution has been adopted, the old one governs as to bonds issued under its authority, though not actually issued until after the adoption of the new one; *Moultrie County v. Fairfield*, 105 U. S. 370 (1881), holding that where a donation in aid of a railroad had been voted by a county before the adoption of the new constitution of Illinois, bonds to pay it might be issued after its adoption. In *Louisville v. Savings Bank*, 104 U. S. 469 (1881), it was held that the court would even take cognizance of the fractions of a day in order to do justice in such a case. *Schall v. Bowman*, 62 Ill. 321 (1872); *Richards v. Donagho*, 66 Ill. 73 (1872); *Wright v. Bishop*, 88 Ill. 302 (1878). *Contra*, *Jeffries v. Lawrence*, 42 Iowa, 498 (1876); *Falconer v. Buffalo, etc. R. R.*, 69 N. Y. 491 (1877); *List v. Wheeling*, 7 W. Va. 501 (1874). *Cf.* *Hayes v. Holly Springs*, 114 U. S. 120 (1885); *Henderson v. Jackson County*, 2 McCary, 615 (1881).

passed after a municipal subscription is voted, but before it is actually completed.¹

It has been held that a provision restricting the power of a state to make subscriptions in aid of railroads cannot be construed so as to prohibit the municipal subdivisions of the state from subscribing.² And a restriction as to the power of a county will not be held applicable to a city.³ School districts have no power to subscribe to the stock of a railroad, and bonds issued to pay such a subscription are void.⁴

§ 93. *Change in the state constitution or the general statutory laws after the municipal corporation has voted to subscribe.* Constitutional provisions or general statutes prohibiting municipal corporations from subscribing to the stock of other corporations, or from lending their credit thereto, are, as already stated,⁵ prospective in their application.

That which a corporation has the constitutional or statutory right to do, and which it has done in pursuance of that right or authority, cannot be affected or undone by subsequent constitutional change or amendment, or by the passage of general stat-

¹ For cases involving a construction of the Illinois constitution and its effects on previous donations, see *Fairfield v. Gallatin County*, 100 U. S. 47 (1879); *Chicago, etc. R. R. v. Pinckney*, 74 Ill. 277 (1874); *Lippincott v. Pana*, 92 Ill. 24 (1879); *Middleport v. Ætna L. Ins. Co.*, 82 Ill. 562 (1876). Cf. *Moultrie County v. Fairfield*, 105 U. S. 370 (1881); *Enfield v. Jordan*, 119 U. S. 680 (1887).

² *Pattison v. Yuba County*, 13 Cal. 175 (1859); *New Orleans v. Graihle*, 9 La. Ann. 561 (1854); *Slack v. Maysville, etc. R. R.*, 13 B. Mon. (Ky.) 1 (1852); *Leavenworth County v. Miller*, 7 Kan. 479 (1871); *Prettyman v. Tazewell County*, 19 Ill. 406 (1858). The courts are inclined to hold that a limit on the rate of taxation that a city may levy does not apply to a tax in aid of municipal subscriptions to railroads. Cf. *People v. State Treasurer*, 23 Mich. 499 (1871); *Pitzman v. Freeburg*, 92 Ill. 111 (1879).

³ *Thompson v. Peru*, 29 Ind. 305

(1868); *Aurora v. West*, 9 Ind. 74 (1857). The statute may prescribe that the aid voted shall not bind property outside of a town in the county, unless the residents outside of the town vote in favor of it. *Kentucky Union R. R. v. Bourbon County*, 85 Ky. 98 (1887); *Dillon, Mun. Corp.*, § 162, citing *Butz v. Muscatine*, 8 Wall. 575 (1869); *Learned v. Burlington*, 2 Am. L. Reg. (N. S.) 394 (1863), and n.; *Leavenworth v. Norton*, 1 Kan. 432 (1863); *Burnes v. Atchison*, 2 Kan. 454 (1864). And see *Commonwealth v. Pittsburgh*, 34 Pa. St. 496 (1859); *Amey v. Allegheny City*, 24 How. (U. S.) 364 (1860); *State v. Perrysburg*, 14 Ohio St. 472 (1863); *Cumberland v. Magruder*, 34 Md. 381 (1871); *Assessors v. Commissioners*, 3 Brewst. (Pa.) 333 (1869); *State v. Guttenberg*, 38 N. J. L. 419 (1876).

⁴ *Weightman v. Clark*, 103 U. S. 256 (1880).

⁵ § 92, *supra*.

utes. This is a fundamental rule of constitutional law.¹ If, however, a popular vote does not give the company proposed to be benefited a vested right to the subscription by the municipality, and if, until the subscription is actually made, the contract is unexecuted, and therefore obligatory upon neither party, there is ground for holding that a constitutional prohibition, taking effect after the election, but before the subscription is made pursuant to authority conferred by the popular vote, will be sufficient to invalidate the subscription. This was the view taken by the supreme court of the United States in the case of *Aspinwall v. Commissioners of the County of Daviess*,² and approved in some later cases.³ There are cases of authority, however, in favor of the rule that, after the corpo-

¹See, in regard to the Illinois constitution, *Clay County v. Society for Savings*, 104 U. S. 579 (1881); *People v. Logan County*, 63 Ill. 374 (1872); *Moultrie County v. Rockingham, etc. Sav. Bank*, 92 U. S. 631 (1875); *Louisville v. Savings Bank*, 104 U. S. 469 (1881); *Choisser v. People*, 140 Ill. 21 (1892). See also *Nelson v. Haywood County*, 87 Tenn. 781 (1889). An irregular vote to issue bonds before a constitutional provision is enacted cannot be legalized by legislative act afterwards. *Williams v. People*, 132 Ill. 574 (1890). Where the original subscription was conditional, the condition cannot be waived after a constitutional provision prohibiting these subscriptions has been passed. *Richeson v. People*, 115 Ill. 450 (1886). To the same effect, with regard to the constitution of 1875 of Nebraska, see *State v. Lancaster County*, 6 Neb. 214 (1877); and as to constitution of Missouri of 1865, see *Louisiana v. Taylor*, 105 U. S. 454 (1881); *Cass County v. Gillett*, 100 U. S. 585 (1879); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *Ray County v. Vansycle*, 96 U. S. 675 (1877); *Callaway County v. Foster*, 93 U. S. 567 (1876); *Ralls County v. Douglass*, 105 U. S. 728 (1881), in which bonds issued under a city charter without a popular vote were held valid not-

withstanding the provisions of a constitution adopted afterwards, but in force when the bonds were issued, required a submission of such matters to a vote; *State v. Macon County Court*, 41 Mo. 453 (1867), to the same effect; *State v. Sullivan County Court*, 51 Mo. 522 (1873), to the same effect. Cf. *State v. Dallas County Court*, 72 Mo. 329 (1880), where a later statute was held to have taken away the power under a former one. A statute passed subsequently to a constitutional prohibition may legalize an irregular subscription made before the prohibition. *Bolles v. Brimfield*, 120 U. S. 759 (1887). The repeal of the act authorizing a tax for municipal aid before any money has been expended by the railroad, excepting a small sum for surveys, prevents a lessee of the railroad enforcing payment when the taxes were not assigned to the lessee. *Barthel v. Meader*, 72 Iowa, 125 (1887).

²22 How. 364 (1859).

³*Norton v. Brownsville*, 129 U. S. 479 (1889); *Wadsworth v. Supervisors*, 102 U. S. 534 (1880). See also *Railroad Co. v. Falconer*, 103 U. S. 821 (1880); *German Sav. Bank v. Franklin County*, 128 U. S. 526 (1888); *Eddy v. People*, 127 Ill. 428 (1889).

ration has, by a popular vote at an election lawfully held, voted to subscribe for stock, subsequent changes of the constitution or the general statutes will not affect the right of the municipality to go on and complete the contract, to make the formal subscription, and to issue the bonds or levy the special tax to pay the calls.¹

§ 94. *Statutory formalities must be substantially complied with.*—A substantial compliance with the formalities prescribed by a statute authorizing a municipal subscription to stock is all that the law requires; but such a compliance is requisite to the validity thereof.² Where the statute authorizing municipal-

¹ *United States v. Jefferson County*, 5 Dill. 310 (1878); S. C., 26 Fed. Cas. 597; *Maenhaut v. New Orleans*, 3 Woods, 1 (1876); S. C., 16 Fed. Cas. 380; *Sibley v. Mobile*, 3 Woods, 535 (1876); S. C., 22 Fed. Cas. 57; *Nicolay v. St. Clair County*, 3 Dill. 163 (1874); S. C., 18 Fed. Cas. 227; *Huidekoper v. Dallas County*, 3 Dill. 171 (1875); S. C., 12 Fed. Cas. 845. Cf. *Red Rock v. Henry*, 106 U. S. 596 (1882), and cases in note 1, p. 231.

² Bonds issued by municipalities to aid railroads are valid only when issued in compliance with the statute authorizing them. *Young v. Clarendon*, 132 U. S. 340 (1889); *Hoff v. Jasper County*, 110 U. S. 53 (1884), following the ruling in *Anthony v. Jasper County*, 101 U. S. 693 (1879), where it was held that a *bona fide* holder of bonds could not maintain an action on bonds not registered with the state auditor as required by statute; *Bissell v. Spring Valley*, 110 U. S. 162 (1884), holding that when a statute required bonds to be attested by the county clerk under the seal of the county, bonds issued without his signature were not valid; *Hamlin v. Meadville*, 6 Neb. 227 (1877), holding that a vote authorizing a subscription gives no power to make a donation; *Cairo, etc. R. R. v. Sparta*, 77 Ill. 505 (1875), where bonds were authorized by a vote upon a propo-

sition that they should run *twenty* years, when the statute submitted a proposition to be voted upon for bonds to run not exceeding *ten* years, the court refused to compel the city to issue them; *Mustard v. Hoppess*, 69 Ind. 324 (1879), where an election, and a tax voted and levied in pursuance of it, were held *not* invalidated on account of a canvass of the votes which was not entirely regular; *People v. Dutcher*, 56 Ill. 144 (1870), holding that when the statute does not prescribe a mode of election it should be held in accordance with the law of the organization of the municipality; *People v. Logan County*, 63 Ill. 374 (1872). This case was an application for *mandamus* to compel a subscription. A demurrer to an answer alleging that the vote in favor of subscription was obtained by fraudulent votes with the knowledge of the corporation to be benefited was overruled; *Pana v. Lippincott*, 3 Ill. App. 466 (1877), where a vote taken at a *special* town meeting, when the statute required it to be taken at a *regular* meeting, was held not to confer authority to subscribe; *People v. Smith*, 45 N. Y. 772 (1871), holding that, when the act requires a petition of taxpayers, the power is personal to them and cannot be exercised by an agent; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611 (1879), hold-

aid bonds requires that the road should be constructed before the bonds are good, a purchaser is bound to take notice of that fact.¹ If the statute requires the profile and estimates to be made before municipal aid is given, a subsequent variation releases the subscription.²

But not every failure to observe all the formalities prescribed by the statute is sufficient to invalidate a subscription. When the omission is a matter of form more than of substance, it will not invalidate the subscription.³

ing that a judgment on bonds issued by a municipality is conclusive upon it as to the validity of the bonds and as to all defenses which might have been urged against it at law; but in a bill in equity to enforce a statutory trust by which the property, etc., of the municipality was pledged to pay them, it may show that the bonds were issued in violation of the conditions of the statute; *Munson v. Lyons*, 12 Blatchf. 539 (1875); S. C., 17 Fed. Cas. 1002, holding that an objection which would be good in a direct review of the proceedings—as here, that the petition of taxpayers gave the authorities no jurisdiction—may be of no avail as against *bona fide* holders of bonds; *Thompson v. Perrine*, 103 U. S. 806 (1880); *Jasper County v. Ballou*, 103 U. S. 745 (1880), and *Massachusetts, etc. Co. v. Cherokee*, 42 Fed. Rep. 750 (1890), holding that a subsequent statute may correct errors. See also *Carroll County v. Smith*, 111 U. S. 556 (1884); *Hawley v. Fairbanks*, 108 U. S. 543 (1883); *Buchanan v. Litchfield*, 102 U. S. 278 (1880); *People v. Hulburt*, 46 N. Y. 110 (1871); *People v. Suffern*, 68 N. Y. 321 (1877); *Wilson v. Caneadea*, 15 Hun, 218 (1878); *Angel v. Hume*, 17 Hun, 374 (1879); *People v. Hutton*, 18 Hun, 116 (1879); *People v. Barrett*, 18 Hun, 206 (1879); *Wheatland v. Taylor*, 29 Hun, 70 (1883). A municipal subscription, authorized by statute, to a corporation to construct locks and dams, and duly

made, cannot be enforced to pay for repairing old locks and dams. *Jessamine County v. Swigert's Adm'r*, 3 S. W. Rep. 13 (Ky., 1887). Where judgment is taken by default the facts alleged cannot be disputed in the *mandamus* proceedings. *Harshman v. Knox County*, 122 U. S. 306 (1887). A vote of municipal aid is void if the grantee is in the alternative. *State v. Roggen*, 22 Neb. 118 (1887). In Kansas a taxpayer cannot enjoin the board from declaring the vote on municipal aid. He must wait and enjoin the subscription. *State v. Wabaunsee County*, 36 Kan. 180 (1887); *People v. Santa Anna*, 67 Ill. 57 (1873), where an election was held illegal because held without a registration of voters as required by law; *People v. Laenna*, 67 Ill. 65 (1873), a similar case; *Chicago, etc. R. R. v. Mallory*, 101 Ill. 583 (1882), where an election presided over by one moderator with one clerk, when the law required three judges and two clerks, was held void, conferring no authority upon a town to issue bonds. Municipal bonds issued without the order of the grand jury, as required by statute, are not collectible by an owner who does not show that he is a *bona fide* holder. *Frick v. Mercer County*, 138 Pa. St. 523 (1891).

¹ *Mercer County v. Provident, etc. T. Co.*, 72 Fed. Rep. 623 (1896).

² *State v. Morristown*, 93 Tenn. 239 (1893).

³ *Pana v. Bowler*, 107 U. S. 529

Many of these defenses, however, are defeated by the fact that the municipality is estopped from setting up the illegality, there having been long delay, or the recitals on the bonds themselves having represented that the legal formalities were duly observed.¹ A *bona fide* holder of a municipal bond issued

(1882), holding that the fact that an election was irregularly conducted could not avail as a defense to bonds in the hands of a *bona fide* holder, the court refusing to follow the ruling of the Illinois supreme court in *Lippincott v. Pana*, 92 Ill. 24 (1879), which declared the bonds void; *Johnson County v. Thayer*, 94 U. S. 631 (1876), where the court said: "Defects, irregularities, or informalities which do not affect the result of the vote do not affect its validity;" *Belfast, etc. R. R. v. Brooke*, 60 Me. 568 (1872), where a call for a town meeting "to see if the town will loan its credit to aid in the construction" of a railroad named was held to give reasonable notice that a proposition to subscribe for its stock would be acted upon; *Draper v. Springport*, 104 U. S. 501 (1881), in which the absence of a seal was held not to affect the right of a *bona fide* holder to recover upon bonds issued in payment of a subscription; *Clarke v. Hancock County*, 27 Ill. 305 (1862), where the informality consisted in submitting two propositions by one vote, and it was held not to invalidate bonds in the hands of *bona fide* holders; *Supervisors v. Schenck*, 5 Wall. 772 (1866), where bonds issued under a vote ordered by a "county court," instead of by the "board of supervisors," were held valid because taxes had been levied and interest paid upon them by the proper authorities for nine years before the claim was made that they were void. Cf. *Jasper County v. Ballou*, 103 U. S. 745 (1880); *Pana v. Bowler*, 107 U. S. 529 (1882); *Johnson v. Stark County*, 24 Ill. 75 (1860); *Singer Mfg. Co. v. Elizabeth*, 42 N. J. L. 249 (1880); *New*

Haven, etc. R. R. v. Chatham, 42 Conn. 465 (1875), where a vote which should have been by ballot was taken by division of the house, and no objection was made thereto until a railroad had in good faith issued bonds which were to be guaranteed by the town.

¹*Nugent v. Supervisors*, 19 Wall. 241 (1873), is the leading case. It holds that the delivery of the municipal bonds to the railroad in exchange for the stock, together with the levy of a tax to pay the interest on the bonds, and the act of the municipality in voting as a shareholder, estop it from denying the legality of the subscription. *Menasha v. Hazard*, 102 U. S. 81 (1880), where bonds were issued to be valid when it was certified on them that certain conditions had been performed. Such a certificate was held to estop the town from denying their validity; *Whiting v. Potter*, 2 Fed. Rep. 517 (1880), in which it was held that retaining railroad stock received for bonds, and paying interest on the bonds for a long time, estopped a municipality from questioning their validity, such acts being a direct ratification of the issue; *Lamb v. Burlington, etc. R. R.*, 39 Iowa, 333 (1874), holding that voting a tax in aid of a railroad, and remaining silent for a year, during which the road was completed upon the faith of the tax, and until the benefits accruing from the completion were realized, estopped a township from denying the validity of the tax; *Leavenworth, etc. R. R. v. Douglas County*, 18 Kan. 169 (1877), where the failure of a railroad to comply with the conditions of an agreement by which it was to receive bonds was a

on payment of a subscription to stock need not inquire as to whether the bonds were issued upon the petition of two-thirds of the freeholders, inasmuch as the recitals in the bonds to that effect will protect him.¹

The meeting must be duly called and by the proper officer;² the notice of the meeting must be duly posted for the full time provided in the act.³ Where a municipality has subscribed for

matter of public knowledge, and the county issuing the bonds made no objection, but paid interest on the bonds for years. These circumstances were considered a ratification of the acts of the county officers in issuing them; *Lyons v. Munson*, 99 U. S. 684 (1878), holding that where, under the act of New York, the county judge decides upon an application of taxpayers, his judgment, recited in the bonds, cannot be attacked by the town in an action on bonds by a *bona fide* holder, and the town is estopped to deny their validity on that account; *Hackett v. Ottawa*, 99 U. S. 86 (1878), holding that, when bonds purport on their face to have been issued to provide for a loan for municipal purposes, the city is estopped from setting up against an innocent purchaser for value that they were void because the proceeds were appropriated to other purposes—as for a donation to a private corporation; *Pendleton County v. Amy*, 13 Wall. 297 (1871), holding that where the issue of bonds by county officers, without previous fulfillment of conditions, would be a misdemeanor, the presumption is that the conditions were fulfilled; and the receiving of stock in payment and holding it for seventeen years work an estoppel; *First Nat. Bank v. Wolcott*, 19 Blatchf. 370 (1881), where the retaining of stock received for bonds, and paying interest on the bonds, was held, as against *bona fide* holders, to be a ratification of the act of commissioners in issuing them, the re-

cital on them being that they were issued in pursuance of a certain statute; *Block v. Commissioners*, 99 U. S. 686 (1878), in which a county was held estopped from asserting that a majority of the electors had not voted in favor of the issue of bonds, the bonds having been issued three years after the vote was declared and recorded; *Carroll County v. Smith*, 111 U. S. 556 (1883), holding that a recital in a bond that it is authorized by a particular statute does not estop the municipality from setting up that it was not authorized by a proper majority of voters,—in this case two-thirds. See also *Amey v. Allegheny City*, 24 How. 364 (1860); *Cagwin v. Hancock*, 84 N. Y. 532 (1881), rev'g S. C., 22 Hun, 201; *Orleans v. Platt*, 99 U. S. 676 (1878).

¹ *Evansville v. Dennett*, 161 U. S. 434 (1896).

² *Windsor v. Hallett*, 97 Ill. 204 (1880); *Richland County v. People*, 3 Ill. App. 210 (1878); *Jacksonville, etc. R. R. v. Virden*, 104 Ill. 339 (1882); *Bowling Green, etc. R. R. v. Warren County Court*, 10 Bush (Ky.), 711 (1874). But see *Sauerhering v. Iron Ridge, etc. R. R.*, 25 Wis. 447 (1870); *Athens County v. Baltimore, etc. R. R.*, 37 Ohio St. 205 (1881).

³ *McClure v. Oxford*, 94 U. S. 429 (1876); *Harding v. Rockford, etc. R. R.*, 65 Ill. 90 (1872), where bonds were held invalid because the notice of election was posted less than thirty days, as required by law; *Packard v. Jefferson County*, 2 Colo. 338 (1874), holding that a change in the propo-

stock illegally, any other stockholder may bring suit to have the subscription canceled.¹

§ 95. *Submission to popular vote.*—While the legislature may authorize a municipality to make a subscription to the stock of a railway or other corporation without submitting the question to a vote of the people,² it has the power to direct that the question shall be so submitted. Such an act does not amount to a delegation of legislative powers.³ When it is provided that a subscription can be made only upon the petition of a certain

sition to vote bonds which is in effect a new proposition cannot be legally voted upon at an election already called, there not being sufficient time remaining before the election to give the required notice; *Anderson County v. Beal*, 113 U. S. 227 (1884), holding that, if the bonds on their face recite that they were issued in pursuance of a vote held on a certain day, the statement is equivalent to one that the vote was regular in form as to prior notice, and the municipal corporation is estopped from showing that it was held without proper notice in an action by a *bona fide* holder; *George v. Oxford*, 16 Kan. 72 (1876), holding that when an election authorizing the issue of bonds was held upon insufficient notice, and the facts appeared upon the face of the bonds, the bonds were void; *Williams v. Roberts*, 88 Ill. 11 (1878), where an election called by twelve voters instead of twenty, as required, upon a ten days' notice, where the statute required twenty days, was held a nullity. See also *Wells v. Pontotoc County*, 102 U. S. 625 (1880); *Lincoln v. Cambria Iron Co.*, 103 U. S. 412 (1880). But where the notice was required by the statute to be "posted by the town clerk or supervisors," it was held that this did not require a posting by these officers in person, but that it was sufficient if they procured others to post the notice. *Philips v. Albany*, 28 Wis. 340 (1871); *Lawson v. Milwaukee*, etc. R'y, 30 Wis. 597

(1872); *Jones v. Hurlburt*, 13 Neb. 125 (1882).

¹ *Stebbins v. Perry County*, 167 Ill. 567 (1897).

² *Otoe County v. Baldwin*, 111 U. S. 1 (1883); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Ralls County v. Douglass*, 105 U. S. 728 (1881); *State v. Macon County Court*, 41 Mo. 453 (1867); *State v. Sullivan County Court*, 51 Mo. 522 (1873). Cf. *State v. Dallas County Court*, 72 Mo. 329 (1880); *McCallie v. Chattanooga*, 3 Head (Tenn.), 317 (1859); *Chicago*, etc. R. R. v. *Aurora*, 99 Ill. 205 (1881); *Burr v. Chariton Co.*, 2 McCrary, 603 (1880). In this case a charter of a railroad authorized it to receive subscriptions from counties without a vote of the people. Bonds so issued were held valid though a prior special act required a vote of taxpayers as a condition precedent to such subscriptions.

³ *Starin v. Genoa*, 23 N. Y. 439 (1861); *Gould v. Sterling*, 23 N. Y. 456 (1861); *Bank of Rome v. Rome*, 18 N. Y. 38 (1858); S. C., 19 N. Y. 20 (1859); *People v. Batchellor*, 53 N. Y. 128, 138 (1873); *Duanesburgh v. Jenkins*, 57 N. Y. 177, 192 (1874); *Hobart v. Butte County*, 17 Cal. 23 (1860); *Slack v. Maysville*, etc. R. R., 13 B. Mon. (Ky.) 1 (1852); *Winter v. Montgomery*, 65 Ala. 403 (1880). In *Harrington v. Plainview*, 27 Minn. 224 (1880), it is held that, where a submission to the people is provided for, it must be to the legal voters of the municipality,

proportion of the legal voters,¹ there must be a substantial compliance with the spirit as well as the letter of the act.²

When the enabling act provides for municipal aid to railways and other quasi-public enterprises upon the assent of a

and cannot lawfully be confined to resident taxpayers, whether legal voters or not. *Cf.* *Babcock v. Helena*, 34 Ark. 499 (1879); *Walnut v. Wade*, 103 U. S. 683 (1880). Again, where a popular vote, taken in accordance with a statute, authorized a subscription to a designated railway, and the bonds were issued to a consolidated road including the first—these facts appearing on the face of the bond,—the invalidity of the transaction was held to appear on the face of it. *Bates County v. Winters*, 97 U. S. 83 (1877). *Cf.* *Chicot County v. Lewis*, 103 U. S. 164 (1880); *Schaeffer v. Bonham*, 95 Ill. 368 (1880). But where a town is authorized to subscribe not exceeding a certain sum to a designated railroad, several subscriptions made at different times and authorized by as many elections, the aggregate not exceeding the amount named in the act, are valid. *Empire v. Darlington*, 101 U. S. 87 (1879). See also *Hurt v. Hamilton*, 25 Kan. 76 (1881); *Society for Savings v. New London*, 29 Conn. 174 (1860); *First Nat. Bank v. Concord*, 50 Vt. 257 (1877).

¹ *E. g.*, in New York. *People v. Hulbert*, 59 Barb. 446 (1871); *People v. Peck*, 62 Barb. 545 (1872); *People v. Oliver*, 1 T. & C. 570 (1873); *People v. Hughitt*, 5 Lans. 89 (1871); *People v. Franklin*, 5 Lans. 129 (1871); *People v. Smith*, 45 N. Y. 772 (1871); *Wellsborough v. New York*, etc. R. R., 76 N. Y. 182 (1879). *Cf.* *St. Joseph v. Rogers*, 16 Wall. 644 (1872); *Syracuse Sav. Bank v. Seneca Falls*, 21 Hun (N. Y.), 304 (1880); *Faris v. Reynolds*, 70 Ind. 359 (1880).

² *People v. Smith*, 45 N. Y. 772 (1871); *Craig v. Andes*, 93 N. Y. 405 (1883);

People v. Oldtown, 88 Ill. 202 (1878). If the statute requires a written application by ten legal voters before the clerk should call an election, such application is necessary to the validity of the election, and without proof of it the municipality cannot be compelled to issue bonds. *Monadnock R. R. v. Peterborough*, 49 N. H. 281 (1870), holding that a town cannot delegate its power to authorize subscriptions to a committee; and a statute requiring the vote of "two-thirds of the legal voters present and voting at" the meeting must be strictly obeyed. *Mercer County v. Pittsburgh*, etc. R. R., 27 Pa. St. 389 (1856), in which a statute designated the grand jury of a county to decide upon a subscription. It was held that the grand jury could not delegate the power so conferred to county commissioners, and that the commissioners could only subscribe in accordance with the decision of the grand jury. Where the municipal bonds recite that the vote was on an application of fifty voters, where the statute required that the application should be by voters and taxpayers, *held*, that the bonds were void, where the application was not by taxpayers. *Gilson v. Dayton*, 123 U. S. 59 (1887). Municipal bonds issued on a vote of a minority of the voters, instead of a majority, as required by the statute, in aid of a railroad, are void. *Onstott v. People*, 123 Ill. 489 (1888). In *Prettyman v. Tazewell County*, 19 Ill. 406, 414 (1858), a case of subscription by a county to railroad stock, a taxpayer waited four months before alleging fraud in the election. *Held* equivalent to acquiescence, and too late. See also *People v. Van Valken-*

majority or two-thirds of the legal voters of the town or county, this is construed universally to mean that the measure is to be approved by a majority or a two-thirds vote, as the case may be; that is to say, by a majority or two-thirds of the voters who vote at the election called for the purpose, and not two-thirds or a majority of all the qualified electors in the territory. Those who fail to vote against the measure are not considered nor counted as having the power to vote.¹

burgh, 63 Barb. 105 (1872); *Evansville, etc. R. R. v. Evansville*, 15 Ind. 395 (1860); *Chicago, etc. R. R. v. Mallory*, 101 Ill. 583 (1882). For the manner in Indiana of contesting an election, see *Goddard v. Stockman*, 74 Ind. 400 (1881).

¹ *Cass County v. Johnston*, 95 U. S. 360 (1877); *Carroll County v. Smith*, 111 U. S. 556 (1884); *Cass County v. Jordan*, 95 U. S. 373 (1877); *Hawkins v. Carroll County*, 50 Miss. 735 (1874); *Louisville, etc. R. R. v. State*, 8 Heisk. (Tenn.) 663 (1875); *State v. Brassfield*, 67 Mo. 331 (1878); *Webb v. Lafayette County*, 67 Mo. 353 (1878); *People v. Harp*, 67 Ill. 62 (1873). *Contra*, *People v. Chapman*, 66 Ill. 137 (1872). *Cf. Dunnovan v. Green*, 57 Ill. 63 (1870), holding that a statute which authorizes a subscription, provided a majority of votes are in favor of it, means a majority of votes cast, not a majority of all voters; *Culver v. Fort Edward*, 8 Hun, 340 (1876), holding that if the statute requires a vote of the majority of taxable inhabitants, the consent of a majority who attended the meeting is not sufficient; *Walnut v. Wade*, 103 U. S. 683 (1879), holding that "inhabitants," as used in an enabling act, meant legal voters; *St. Joseph v. Rogers*, 16 Wall. 644 (1872), where a law of Illinois, requiring a vote of "a majority of the legal voters of any township" in one section, and a majority "voting at such election," was construed to mean a majority of those voting at the election; *People v. Oliver*, 1 T.

& C. 570 (1873), holding that "tax-payers" includes all persons whose names are on the assessment roll as such, though wrongfully taxed — as non-residents; *Milner v. Pensacola*, 2 Woods, 632 (1875); *S. C.*, 17 Fed. Cas. 407, where a statute required the "consent of a majority of the corporation composing" the city. A defense to an action on the bonds by an innocent holder, that only a minority of citizens voted, was held not good; *Melvin v. Lisenby*, 72 Ill. 63 (1874), holding that the presumption is that the vote cast at an election held according to law is the vote of the whole number of legal voters; *Reiger v. Beaufort*, 70 N. C. 319 (1874), where a majority of votes cast at an election was held sufficient under a statute requiring a majority of the voters qualified to vote, although a majority of all the voters of the town did not vote. If the petition must be signed by a majority of freeholders, minors and married women, etc., are to be counted. *State v. Kokomo*, 108 Ind. 74 (1886). See also *Cagwin v. Hancock*, 84 N. Y. 532 (1881). And for a contrary rule, well argued out, see *Harshman v. Bates County*, 92 U. S. 569 (1875) [overruled, however, in *Cass County v. Johnson*, 95 U. S. 360 (1877)], and the dissenting opinions of Miller and Bradley, JJ., in *Cass County v. Johnston*, 95 U. S. 360, 370 (1877). As to the right of a voter or signer to revoke his consent once granted, see *Springport v. Teutonia Sav. Bank*, 84 N. Y. 403 (1881);

The legislature may render effective a prior vote of a municipality, taken without statutory authority, in aid of a railroad. If the state courts vary in their decisions on municipal aid to railroads the federal court will decide upon its own judgment.¹

§ 96. *What officer or agent of the municipality may make the contract of subscription.*—In the absence of any express provision in the enabling act the proper persons to execute the contract of subscription for a municipal corporation are those whose duty it is to execute other contracts for and in the name of the municipality. A subscription is a contract, to be executed in the ordinary way in which any other contract may properly be made. But the act authorizing the subscription frequently provides by whom and in what manner the contract shall be executed. When this is the case the provisions of the statute are to be strictly complied with.²

People v. Sawyer, 52 N. Y. 296 (1873); *People v. Wagner*, 1 T. & C. 221 (1873); *People v. Hatch*, 1 T. & C. 113 (1873). Cf. *First Nat. Bank v. Dorset*, 16 Blatchf. 62 (1879); S. C., 9 Fed. Cas. 98; *Noble v. Vincennes*, 42 Ind. 125 (1873); and see *Hannibal v. Fauntleroy*, 105 U. S. 408 (1881).

¹ *Anderson v. Santa Anna*, 116 U. S. 356 (1886). Cf. *State v. Holladay*, 72 Mo. 499 (1880); *Smith v. Fond du Lac*, 8 Fed. Rep. 289 (1881); *McCall v. Hancock*, 10 Fed. Rep. 8 (1882). The fact that the proposition to vote aid is defeated at one election does not prevent the calling of another election to submit the question again. *Calhoun County v. Galbraith*, 99 U. S. 214 (1878); *Society for Savings v. New London*, 29 Conn. 174 (1860). Nor does a vote of aid to one railroad prevent a subsequent vote of aid to another railroad. *Chicot County v. Lewis*, 103 U. S. 164 (1880).

² *Walnut v. Wade*, 103 U. S. 683 (1880); *Douglas v. Niantic Sav. Bank*, 97 Ill. 228 (1881); *Windsor v. Hallett*, 97 Ill. 204 (1880). The commissioners cannot bind the municipality by a modification of the subscription voted by it. *Bell v. Railroad Co.*, 4

Wall. 598 (1866). A subscription for a municipality by officers in a supposed office which does not constitutionally exist is void. *Norton v. Shelby County*, 118 U. S. 425 (1886). So, for example, where the act provides for the appointment of a board of commissioners to make the subscription, they only are competent to make it; they are for this purpose the agents of the municipality for which they act; they may insert conditions into the contract which, unless repudiated by the corporation, are valid, and will bind all parties concerned; their powers are to be exercised jointly, and therein all must act—a majority not being sufficient by their act to bind the municipality; their acts, when once fully performed, are final and binding, and cannot be recalled or revoked. *Danville v. Montpelier, etc. R. R.*, 43 Vt. 144 (1870). Cf. *First Nat. Bank v. Arlington*, 16 Blatchf. 57 (1879); S. C., 9 Fed. Cas. 95; *First Nat. Bank v. Concord*, 50 Vt. 257 (1877); *People v. Hitchcock*, 2 T. & C. (N. Y.) 134 (1873); *State v. Hancock County*, 11 Ohio St. 183 (1860); S. C., 12 Ohio St. 596. Cf. *Jackson County v. Brush*, 77 Ill. 59

It has been held that, in order to constitute a valid municipal subscription to the stock of a railway company, it is not necessary that there be an actual act of subscribing.¹

But the vote of the taxpayers or inhabitants, as the case may be, is not a subscription, nor does it amount to a subscription; nor does it in general vest in the company for whose proposed benefit the vote was taken a right to have a subscription made.²

It has been held that the officers authorized to make the subscription have a certain amount of discretion in fixing the terms of payment.³

(1875); *Kankakee v. Aetna Life Ins. Co.*, 106 U. S. 668 (1882); *Bissell v. Spring Valley*, 110 U. S. 162 (1884); *Re Bradner*, 87 N. Y. 171 (1881). If the officers or agents of a municipality have a discretion with reference to the subscription, to make it or not, as they may think best under the circumstances, their exercise of that discretion is final, and cannot be reviewed or questioned. *Mercer County v. Pittsburgh*, etc. R. R., 27 Pa. St. 389 (1856). *Cf. Falconer v. Buffalo*, etc. R. R., 69 N. Y. 491 (1877); *First Nat. Bank v. Concord*, 50 Vt. 257 (1877).

¹*Nugent v. Supervisors*, 19 Wall. 241 (1873), holding, also, that a resolution by a duly authorized board of agents, declaring a subscription made, is, upon the acceptance of the subscription in that shape by the railway company, and a notice to the municipality of the acceptance, a good and binding subscription, although there was no subscription made in the books of the company. To same effect see *Moultrie County v. Rockingham*, etc. Bank, 92 U. S. 631 (1875); *Cass County v. Gillett*, 100 U. S. 585 (1879). *Cf. State v. Jennings*, 48 Wis. 549 (1879). The board whose duty it is to make the subscription may do so through the county clerk. *Chicago*, etc. R. R. v. *Stafford County*, 36 Kan. 121 (1887). The bonds, if signed on Sunday, will be invalid, although the signature is

by the proper officer. *De Forth v. Wisconsin*, etc. R. R., 52 Wis. 320 (1881); *Bank of Statesville v. Statesville*, 84 N. C. 169 (1881), where an omission of commissioners to sign bonds was held not fatal, the requirement being directory.

²*Cumberland*, etc. R. R. v. *Barren County Court*, 10 Bush (Ky.), 604 (1874); *Bates County v. Winters*, 97 U. S. 83 (1877). A mere vote of the municipality is not a subscription. If the road is foreclosed before subscription, and the conditions of the subscription are not fully complied with, no suit lies to collect. *Hamilton County v. State*, 115 Ind. 64 (1888); *Bates County v. Winters*, 97 U. S. 83 (1877), holding that where, after an election in favor of making a subscription, the county court made an order for a subscription, and its agent reported that the railroad company had no stock-books, for which, and other reasons, he did not make the subscription, it was held that these acts were not final and self-executing, and did not constitute a subscription. *Wadsworth v. St. Croix County*, 4 Fed. Rep. 378 (1880).

³*Syracuse Sav. Bank v. Seneca Falls*, 86 N. Y. 317 (1881), where it was held that after regular proceedings had been taken to bond a town, the commissioners, under the law, had a right to make the bonds payable at one time or at different times; *Winter v. Montgomery*, 65 Ala. 403 (1880),

§ 97. *Municipal subscriptions may be conditional.*—A municipal corporation may annex to its subscription any condition that an individual subscriber might lawfully prescribe, and may, in consequence, make the payment of the subscription depend upon the performance thereof.¹ Moreover, a municipal corpo-

where a vote authorized the issue of bonds to an amount not exceeding \$1,000,000, and it was held that the corporate authorities had discretionary power to issue them for a less amount.

¹ *Brokaw v. Gibson County*, 73 Ind. 543 (1881); *Portland, etc. R. R. v. Hartford*, 58 Me. 23 (1870). A municipality authorized to vote a subscription to the stock of a railroad company may impose conditions that shops be built in the town. *Casey v. People*, 132 Ill. 546 (1890); *Chicago, etc. R. R. v. Aurora*, 99 Ill. 205 (1881), holding that if, of two conditions, one is legal and the other unauthorized, and they are severable, the illegal one may be rejected and the bonds issued held good as to the other; *Nøsen v. Port Washington*, 37 Wis. 168 (1875); *Perkins v. Port Washington*, 37 Wis. 177 (1875); *Platteville v. Galena, etc. R. R.*, 43 Wis. 493 (1878), holding that, where a town accepted a written proposition from a railroad company, the terms and construction of it were not allowed to be modified by reason of representations made by the company to the voters before the election; *Foote v. Mount Pleasant*, 1 McCrary, 101 (1878); *S. C.*, 9 Fed. Cas. 368. In this case the proceeds of city bonds issued in payment of a subscription to a railroad were to be expended within the county limits. It was held that, as between the city and the road or its assignees with notice, the bonds could not be enforced if no part of the proceeds had been so expended. *Atchison, etc. R. R. v. Phillips County*, 25 Kan. 261 (1881). *Cf. Memphis, etc. R'y v. Thompson*, 24 Kan. 170 (1880); *Red Rock v. Henry*,

106 U. S. 596 (1882); *Shurtleff v. Wiscasset*, 74 Me. 130 (1882); *State v. Hancock Co.*, 11 Ohio St. 183 (1860). In this case commissioners who were authorized to subscribe for stock in a railroad to run through their county and to issue bonds therefor, and who had subscribed for the stock, were allowed, as against a proceeding to compel them to issue bonds, to set up the defense that the road had not been located in their county. A certificate of the municipal authorities that the condition has been complied with renders the bonds issued on that certificate valid and enforceable, though the certificate was a fraud on the municipality. *Oregon v. Jennings*, 119 U. S. 74 (1886); *People v. Holden*, 82 Ill. 93 (1876). In this case the completion of a road, except about one mile, and the operation of its trains for that distance over another road so as to supply all the wants of the public, were held a substantial compliance with a condition requiring its completion. *Hodgman v. St. Paul, etc. R'y*, 23 Minn. 153 (1876), holding that a condition calling for the completion of a road to a certain point did not require the building of a bridge across a river, other facilities for crossing it being provided. See also on conditional subscriptions, *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (1875); *Railroad Co. v. Falconer*, 103 U. S. 821 (1880); ch. V, *supra*. In *Madison County Court v. Richmond, etc. R. R.*, 80 Ky. 16 (1882), it is held that, while a county may make such conditions as may seem proper to it before submitting the question of a subscription to a popular vote, the

ration is entitled to the benefit of any implied conditions to which an individual subscriber would be entitled.¹

Where a condition precedent has not been fulfilled the subscription is not enforceable, and bonds issued in payment will be invalid even in the hands of *bona fide* holders; as, for example, where the location of a railway in a certain place is the condition, and the location is not made as required by the condition.² But if it be a condition subsequent, as where a town subscribed for stock in a railway company upon condition that the road should "be built through the town on the line as run by the engineer, with a suitable depot for the convenience of the public," a failure to perform is not a defense to an action to collect assessments.³

§ 98. *When may a municipal subscription be paid in bonds instead of money?*—The express power of a municipality to subscribe for stock does not authorize it to issue negotiable bonds therefor.⁴ But where a municipal corporation is author-

county court cannot, after the vote is taken, require other conditions, or alter those already imposed, or by a second election change the terms of the contract of subscription as originally made and entered into. See also *Carroll County v. Smith*, 111 U. S. 556 (1884).

¹ *Lamb v. Anderson*, 54 Iowa, 190 (1880).

² *Mellen v. Lansing*, 19 Blatchf. 512 (1881); *Chicago, etc. R. R. v. Marseilles*, 84 Ill. 145 (1876); *BuckSPORT, etc. R. R. v. Brewer*, 67 Me. 295 (1877).

³ *Belfast, etc. R. R. v. Brooks*, 60 Me. 568 (1872). *Cf.* *Chicago, etc. R. R. v. Schewe*, 45 Iowa, 79 (1876). As to a subsequent breach of a condition attached to the subscription, see *People v. Rome, etc. R. R.*, 103 N. Y. 95 (1886). A contract to keep certain shops, etc., permanently in a place, in consideration of local aid, may be disregarded by the railroad after many years, when its terminus changes, etc. *Texas, etc. R'y v. Marshall*, 136 U. S. 393 (1890). Lessees of the purchaser of a railroad purchased at foreclosure sale are not bound by the contract

of the first railroad company, made with municipalities voting aid in reference to depots. *People v. Louisville, etc. R. R.*, 120 Ill. 48 (1887). See also *People v. Holden*, 82 Ill. 93 (1876); *Hodgman v. St. Paul, etc. R. R.*, 23 Minn. 153 (1876); *State v. Clark*, 23 Minn. 422 (1877); *State v. Lime*, 23 Minn. 521 (1877). See also § 78, *supra*. In New York it is held that, where a town imposes, as a condition precedent to its subscription, that the road be located and constructed through the town, the commissioners have no power to accept any agreement from the company or any substitute in lieu of full compliance. *Falconer v. Buffalo, etc. R. R.*, 69 N. Y. 491 (1877). Where the agent of the railroad represented that a depot was to be constructed at a certain place, a failure to so construct is good ground for enjoining the issue of municipal-aid bonds. *Wullenwaber v. Dunigan*, 30 Neb. 877 (1890). *Cf.* ch. IX, *infra*. As to the right to revoke a consent by popular vote, see § 94, *supra*.

⁴ *Norton v. Dyersburg*, 127 U. S. 160 (1888). Even though a municipal cor-

ized to subscribe to the stock of a railway or other corporation, or to lend its credit thereto, and to issue bonds to that end, it may, in the exercise of its proper discretion, instead of selling the bonds and applying the proceeds to the payment of the subscription, deliver the bonds themselves to the railway company in exchange for an equivalent amount of the stock.¹

In New York a contrary view prevails, and there is force in the New York argument that only thus can the full par value of the bonds be realized for the purposes of the enterprise.²

§ 99. *A municipal corporation as a stockholder.*—When a municipal corporation subscribes to the stock of a railroad company, it becomes a stockholder in just the same sense as any individual subscriber; is entitled to the same rights, privileges, and emoluments; and is subject to the same burdens of duty and liability as other holders of the stock.³

poration be authorized by statute to subscribe to the stock of a railroad, yet it cannot issue its negotiable bonds to pay such subscription, there being no statutory authority for the issue of such bonds. *Hill v. Memphis*, 134 U. S. 198 (1890). Cf. *Seybert v. Pittsburg*, 1 Wall. 272 (1863); *Commonwealth v. Pittsburgh*, 41 Pa. St. 278 (1861); *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625 (1875).

Statutory authority to raise money by tax and appropriate it to aid of a railroad does not authorize the issue of bonds by the municipality therefor. *Concord v. Robinson*, 121 U. S. 165 (1887).

¹*Meyer v. Muscatine*, 1 Wall. 384, 392 (1863); *Evansville, etc. R. R. v. Evansville*, 15 Ind. 395 (1860); *Curtis v. Butler County*, 24 How. (U. S.) 435 (1860); *Aspinwall v. Daviess County*, 22 How. 364 (1859), where, before the authorized subscription was made, a new constitution was adopted making such subscriptions void unless paid in cash; *held*, that bonds issued to pay a subscription made after the new constitution was adopted were void. Where a town issues bonds instead of paying money, as required

by statute, and the bonds are declared void, the holder is not subrogated to the right of the railroad to the money itself. *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534 (1888).

²*Starin v. Genoa*, 23 N. Y. 439 (1861); *Bank of Rome v. Rome*, 19 N. Y. 20 (1859); *Horton v. Thompson*, 71 N. Y. 513 (1877); *People v. Bachellor*, 53 N. Y. 128, 136 (1873), where the court says that if the bonds were turned over to the railroad the latter would sell them for what they would bring, which would generally be less than par. For decisions to the effect that, at common law, a municipal corporation cannot sell its bonds at less than par, see *Neuse River Nav. Co. v. Newbern*, 7 Jones, L. (N. C.) 275 (1859); *Dan. Neg. Inst.* (3d ed.), § 1533; *Armstrong County v. Brinton*, 47 Pa. St. 367 (1864); *Gould v. Sterling*, 23 N. Y. 456, 460 (1861).

³*Shipley v. Terre Haute*, 74 Ind. 297 (1881); *Kreiger v. Shelby R. R.*, 84 Ky. 66 (1866); *Gray v. State*, 72 Ind. 567 (1880); 1 *Dan. Neg. Inst.*, § 436; *Murray v. Charleston*, 96 U. S. 432 (1877). See also *Curran v. State*, 15 How. 304 (1853); *Robinson v. Bank of Darien*, 18 Ga. 65 (1855); *Bank of U. S.*

This doctrine is established as an unquestioned rule of law by the long line of cases, both in the state and federal courts, which involve the validity of municipal bonds issued in aid of railroad or other corporations. Where a state is a stockholder in a railroad corporation, its rights are no different from those of a private individual who is a stockholder.¹ Hence, where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote.²

§ 100. *A municipality may enforce delivery of stock to itself in a proper case.*—Under the same circumstances and conditions, and to the same extent, as any other subscriber, a municipal corporation may compel a railway or other corporation to deliver to it stock to which the subscribers in general are entitled. Whatever would prevent an individual subscriber from enforcing such delivery will equally prevent a municipality in a like case.³ A municipal corporation, as a subscriber,

v. Planters' Bank, 9 Wheat. 904 (1824); *Morgan County v. Thomas*, 76 Ill. 120 (1875); *State v. Holladay*, 72 Mo. 499 (1880); *Marshall v. Western N. C. R. R.*, 92 N. C. 322 (1885); *Morgan County v. Allen*, 103 U. S. 498 (1880), holding that the creditors of an insolvent corporation may enforce the liability of municipal corporations upon their bonds; *Robinson v. Bidwell*, 22 Cal. 379 (1863); *People v. Coon*, 25 Cal. 635 (1864), holding that the individual members of a municipal corporation have no such interest in stock in a railroad subscribed for by it as will disable the legislature from authorizing it to compromise with the railroad. A foreclosure of the railroad on a mortgage closes out the stock which a municipality has therein. *Spurlock v. Missouri Pac. R'y*, 90 Mo. 199 (1886). See also § 890. A judgment creditor may reach a municipal subscription payable in bonds by *mandamus*, after acquiring the company's right thereto. *Smith v. Bourbon County*, 127 U. S. 105 (1888). A municipality as a stockholder may assent to the sale of the railroad by

the corporation to another reorganized corporation. *Foster v. Chesapeake, etc. R'y*, 47 Fed. Rep. 369 (1891). A municipality's stock in a corporation cannot be reached by a judgment creditor of the municipality except by proving that the subscription was legal. *Hughes v. Craven County*, 107 N. C. 598 (1890). Where stock in a railroad is owned by a part of a county, that part becomes a municipality for the purpose of owning and voting the stock. *Hancock v. Louisville, etc. R. R.*, 145 U. S. 409 (1892). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt, nor can it be levied on the dividends from such stock. So held where stock was owned by a city in trust for the citizens. *Hitchcock v. Galveston Wharf Co.*, 50 Fed. Rep. 263 (1880).

¹ *Southern R'y v. North Carolina R. R.*, 81 Fed. Rep. 595 (1897).

² *Tucker v. Russell*, 82 Fed. Rep. 263 (1897).

³ *Wapello County v. Burlington, etc. R. R.*, 44 Iowa, 585 (1876). In this

is in no better position than an individual subscriber in this respect.¹

§ 101. *Division of the municipality after the subscription.*—We find a line of cases in the reports of some of the western states which deals with the questions which have grown out of the subdivision of towns and counties in those states, after a donation or subscription has been made to some railroad or other corporation, and before the bonds have been issued, or before they have become due and payable.

It is, of course, not competent for the legislature so to divide a municipality as to release all or any part of it from the obligation of any contract into which the whole had previously entered.² When a town or county is divided, or some part of it annexed to some other town or county, after the undivided municipality has voted a subscription, and it is provided in the act by which the division is accomplished that each part shall remain liable for the previous municipal indebtedness, such provision is held to mean nothing more than that, as concerns the subscription voted, each part is liable for its proportion only of the debt according to the valuation of the property of the undivided municipality at the time the vote was taken.³ This rule, however, cannot affect the creditor's right to hold liable the whole of the old municipality.

§§ 102, 103. *Consolidation of companies after the municipal aid is voted.*—When the company proposed to be benefited unites or is consolidated with another company or companies of a similar character, after the aid of a municipality has been voted and before the subscription has been paid — the company having before the election the right to consolidate,— the bonds

case the stock was to be issued only Ark. 497 (1878), holding that, in the absence of statutory provision, the detached part of a county is released from liability for the debts of the county; but the legislature may apportion the debt between the old and the new counties; McBride v. Hardin County, 58 Iowa, 219 (1882), holding that a county is not responsible for expenses incurred by one of the townships comprising it in voting taxes in aid of a railroad.

¹Pittsburgh, etc. R. R. v. Allegheny County, 79 Pa. St. 210 (1875). Cf. State v. Garrouette, 67 Mo. 445 (1878).

²Sedgwick County v. Bailey, 11 Kan. 631 (1873). Cf. State v. Lake City, 25 Minn. 404 (1879); Marion County v. Harvey County, 26 Kan. 181 (1881); Henderson v. Jackson County, 12 Fed. Rep. 676 (1881).

³Hurt v. Hamilton, 25 Kan. 76 (1881). See also Eagle v. Beard, 33

may lawfully be issued to or sold for the benefit of the new or consolidated company.¹ When, however, the consolidation works such a fundamental change in the constitution and purpose of the original corporation that individual subscribers are thereby released, a subscription by the municipality will be invalidated,² but otherwise not.³ It is accordingly said that mu-

¹ *Livingston County v. Portsmouth Bank*, 128 U. S. 102 (1888); *New Buffalo v. Iron Co.*, 105 U. S. 73 (1881); *Bates County v. Winters*, 97 U. S. 83 (1877); *Scotland County v. Thomas*, 94 U. S. 682 (1876); *East Lincoln v. Davenport*, 94 U. S. 801 (1876); *Wilson v. Salamanca*, 99 U. S. 499 (1878); *Empire v. Darlington*, 101 U. S. 87 (1879), holding that, where stock in a railroad had been subscribed for by a township under statutory authority, an additional subscription after it was consolidated with another road and under a new name was valid; *Menasha v. Hazard*, 102 U. S. 81 (1880); *Harter v. Kernochan*, 103 U. S. 562 (1880), holding that where township records showed that bonds were directed to be issued and delivered to a consolidated company, although the act authorizing them and the vote under it contemplated the issue to one of the consolidated companies, the township was estopped to deny their validity; *Tipton County v. Locomotive Works*, 103 U. S. 523 (1880); *State v. Greene County*, 54 Mo. 540 (1874); *Mount Vernon v. Hovey*, 52 Ind. 563 (1876). See also *Nugent v. Supervisors*, 19 Wall. 241 (1873); *Cantillon v. Dubuque*, etc. R'y, 78 Iowa, 48 (1889); *Henry County v. Nicolay*, 95 U. S. 619 (1877). In this case a railroad company had, after the subscription, transferred its franchises to another company. In a suit upon the bonds, paid for the stock, in the hands of an innocent purchaser, the bonds were upheld. *Schuyler County v. Thomas*, 98 U. S. 169 (1878). Cf. *Harshman v. Bates*

County, 92 U. S. 569 (1875). A municipal aid cannot be enforced where the railroad company sells all its property to another company. *Cantillon v. Dubuque*, etc. R. R., 35 N. W. Rep. 620 (Iowa, 1887).

² *Lynch v. Eastern*, etc. R'y, 57 Wis. 430 (1883). *Harshman v. Bates County*, 92 U. S. 569 (1875), will hardly be followed. It does not accord with the current decisions. See *Crooks v. State*, 4 N. E. Rep. 589 (Ind., 1886).

³ *Atchison*, etc. R. R. v. *Phillips County*, 25 Kan. 261 (1881); *Society for Savings v. New London*, 29 Conn. 174 (1860). In this last case the new company was substantially the same as the one to which the subscription was made. The court held the issue of the bonds to the new company valid; *Illinois*, etc. R'y v. *Barnett*, 85 Ill. 313 (1877), holding that the legal purchase of another road will not invalidate subscriptions; *Howard County v. Booneville*, etc. Bank, 108 U. S. 314 (1882), holding, that the defense, after paying interest for several years, that the road constructed was not the one to whose stock the subscription was authorized, was not good, it appearing that it was a branch of the road referred to in the act; *Commonwealth v. Pittsburgh*, 41 Pa. St. 278 (1861); *Lewis v. Clarendon*, 5 Dillon, 329 (1878); S. C., 15 Fed. Cas. 474; *Chickaming v. Carpenter*, 106 U. S. 663 (1882). A subsequent consolidation of a company with another does not release the municipality from its obligation to deliver the bonds. *Morrill v. Smith County*, 89 Tex. 529 (1896).

municipal bonds voted and delivered to a corporation under a changed name are not by such change invalidated.¹ Where a railroad company has received local aid and afterwards removes its tracks, it is liable to the municipality for the aid so rendered.²

¹ *Reading v. Wedder*, 66 Ill. 80 (1872); *Commonwealth v. Pittsburgh*, 41 Pa. St. 278 (1861). In *Marsh v. Fulton County*, 10 Wall. 676 (1870), where the legislature so amended the charter of a railway company as to divide the road into three divisions, and each division was made a new company, so that there were three distinct corporations in place of the original corporation, it was held by the federal supreme court that a subscription of stock and issue of county bonds, authorized by a popular vote to be made to the original corporation, could not legally be made to one of the three new corporations. Consolidation with another railroad is no defense to the county, where the statute authorizing it existed at the time of the county vote. *Chicago, etc. R. R. v. Stafford County*, 36 Kan. 121 (1887); *County, etc. v. Locomotive, etc.*, 103 U. S. 523 (1880), holding that if a municipal corporation consents to a consolidation of roads it is estopped from denying the validity of its bonds in the hands of a *bona fide* holder.

² *Town of Hinckley v. Kettle, etc. R. R.*, 72 N. W. Rep. 835 (Minn., 1897).

CHAPTER VII.

CALLS.

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| <p>§ 104. Definition of call.</p> <p>105. Call is generally necessary.</p> <p>106. When a call is unnecessary — Payment in advance.</p> <p>107. In New York no call is required.</p> <p>108. In case of corporate insolvency no call is necessary.</p> <p>109. Who has authority to make calls.</p> <p>110. Calls by directors.</p> <p>111. Assignment of subscriptions by corporation before or after call.</p> <p>112. Interest runs from the time the call is due.</p> | <p>§ 113. Stockholder cannot question advisability of call.</p> <p>114. Calls must be impartial and uniform.</p> <p>115. Method of making calls — No formalities necessary.</p> <p>116. Time, place, amount, and person to whom payable.</p> <p>117. Notice of calls — Cases holding it not necessary.</p> <p>118. Notice of calls — Cases holding it necessary.</p> <p>119. Methods of serving notice of calls.</p> <p>120. Demand, waiver, pleadings, etc.</p> |
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§ 104. *Definition of call.*—A “call” may be defined to be an official declaration, by the proper corporate authorities, that the whole or a specified part of the subscriptions for stocks is required to be paid.¹ The term, however, is used with different meanings, and may refer to the resolution of the officials that a part or the whole of the subscription must be paid, or to the resolution and notification thereof, or the combination of facts making the parties called on liable to an action for the non-payment of the money called.² An assessment is a term often used to designate the same thing as a call, but sometimes refers to payments sought to be recovered from the stockholders,

¹ *Braddock v. Philadelphia, etc. R. R.*, 45 N. J. L. 363 (1883), holding also that a direction by the directors to the president to collect the subscriptions is a call. In *Spangler v. Indiana, etc. R’y*, 21 Ill. 276 (1859), a call or assessment is rather vaguely defined as “a rating or fixing of the proportion, by the board of directors, which every subscriber is to pay of his subscription, when notified of it and when called on.” *Newry, etc. R’y v. Edmunds*, 2 Exch. 118 (1848), holds that a call is an application to

each shareholder for a proportion of his share.

² Quoted and approved in *Germania Iron Min. Co. v. King*, 94 Wis. 439 (1896). See also *Queen v. Londonderry, etc. R’y*, 13 Q. B. 998 (1849). In *Ambergate, etc. R’y v. Mitchell*, 4 Exch. 540 (1849), it is said “the word ‘call’ is capable of three meanings: it may either mean the resolution, or its notification, or the time when it becomes payable. It must mean either one of these three.”

above and in addition to the par value of the stock.¹ An instalment is one of the several part payments into which a single call may be divided.

§ 105. *Call is generally necessary.*—As a general rule a call must be made in order to render a subscription or any part thereof due and payable to the corporation. A contract of subscription is a promise to pay; but, unlike other contracts to pay money, the payment is to be only at such times, and in such part payments, as may be designated by the corporate authorities in a formal declaration known as a “call.”² In other words, the subscription is a debt payable at a future time.³ The time when it shall be paid is indefinite until fixed by a call.

¹Quoted and approved in *Omo v. Bernart*, 65 N. W. Rep. 622 (Mich., 1895).

²“No action can be maintained against a stockholder for an instalment on his subscription until the board has directed the call to be made.” *Banet v. Alton, etc. R. R.*, 13 Ill. 504 (1851); *Spangler v. Indiana, etc. R’y*, 21 Ill. 276 (1859); *Braddock v. Philadelphia, etc. R. R.*, 45 N. J. L. 363 (1883); *Ventura, etc. R’y v. Hartman*, 116 Cal. 260 (1897). In *Grosse Isle Hotel Co. v. P’Anson*, 43 N. J. L. 10 (1880); *aff’d*, 43 N. J. L. 442 (1881), the court said a subscription for stock “imports an agreement not to pay at once the whole sum representing the value of the shares subscribed for, but a stipulation to pay such sum when called for by the directors in amounts duly assessed.” And in *Bank of South Australia v. Abrahams*, L. R. 6 P. C. App. 265 (1875), the court said: “The company has no absolute right, and the shareholder is under no absolute liability to pay. The right only arises if and when calls are made by the directors. . . . The due making of the call by the resolution of a board of directors is an essential condition precedent.” To the same effect, see *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1878). Where, by statute or charter, payment is to be in such manner and proportion and times as

the directors may order, there can be no suit to collect until after a call. *Grissell’s Case*, L. R. 1 Ch. App. 528, 535 (1866); *Alabama, etc. R. R. v. Rowley*, 9 Fla. 508 (1861). Even where the stock is fraudulently issued as paid up, in payment for property, and the transaction is impeached for fraud, a call is necessary before the subscription can be enforced. *Granite Roofing Co. v. Michael*, 54 Md. 65 (1880). Where, however, for failure to furnish the property due on a subscription, a suit for damages is brought by the corporation, no call need precede such suit. An allegation of a general demand suffices. *Cheraw, etc. R. R. v. Garland*, 14 S. C. 63 (1880); *Ohio, etc. R. R. v. Cramer*, 23 Ind. 490 (1864). A call is not applicable to stock which was subscribed for after the call was made. *Pike v. Bangor, etc. R. R.*, 68 Me. 445 (1878). A subscription payable “in such instalments and at such times as may be decided by a majority of the stockholders or board of directors,” etc., is not collectible until the instalments and times have been so fixed. *North, etc. R. R. v. Spullock*, 88 Ga. 283 (1892). A call must be alleged where the subscription liability is set up by the defendant company as a set-off. *Holt v. Holt, etc. Co.*, 79 Fed. Rep. 597 (1897).

³The subscription “is a present debt, payable at a future day.” *Pitts-*

· § 106. *When a call is unnecessary — Payment in advance.*— If, however, a subscription contains a promise to pay upon a certain day, no call is necessary; but the subscriber is bound to pay, at all events, upon the day named.¹ So, also, if by statute or the charter the subscription becomes payable at a certain specified time, a call is thereby dispensed with, and is not required.² A stockholder, on the other hand, is not obliged to wait for a call even when entitled to it. He may pay at any time.³ Where stockholders advance money in prepayment of calls the company may pay them interest on the same up to the time that the call is due, even though such interest is paid out of the capital.⁴ A note given in payment for a subscription

burgh, etc. R. R. v. Clarke, 29 Pa. St. 146 (1857). The subscription "creates a debt, but the debt does not accrue due until a call is made." Grissell's Case, L. R. 1 Ch. App. 528, 535 (1866). In *Re China Steamship, etc. Co.*, 38 L. J. (Ch.) 512 (1869), the court said: "The moment the call is made it is a debt due in every respect," although it cannot be collected by suit until later. The bankruptcy act does not release an applicant thereunder from liability for calls made after his release in bankruptcy. *Glenn v. Howard*, 65 Md. 40 (1886).

¹ *Estell v. Knightstown, etc. Turnp. Co.*, 41 Ind. 174 (1872); *New Albany, etc. R. R. v. Pickens*, 5 Ind. 247 (1854); *Ross v. Lafayette, etc. R. R.*, 6 Ind. 297 (1855); *Breedlove v. Martinsville, etc. R. R.*, 12 Ind. 114 (1859); *Waukon, etc. R. R. v. Dwyer*, 49 Iowa, 121 (1878). Where a subscriber gives a note in payment of the subscription the assignee of the corporation may enforce the note, although no calls have been made on subscriptions. *Ruse v. Bromberg*, 88 Ala. 619 (1889).

² *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876).

³ *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800; *Poole's Case*, L. R. 9 Ch. D. 322 (1878). But if such payment is by the directors themselves, and it is immediately repaid to them for fees, the corporation

being insolvent, the transaction will be set aside. *Sykes's Case*, L. R. 13 Eq. Cas. 255 (1871). So, also, a payment in advance, on an agreement that such payment shall be only a loan if the corporation is successful, but shall be a payment of the subscription if the corporation becomes insolvent, is held to be a loan, though insolvency occurs. *Barge's Case*, L. R. 5 Eq. Cas. 420 (1868). Frequently a subscription is paid, before a call, by applying to its payment money due the subscriber from the corporation. *Adamson's Case*, L. R. 18 Eq. Cas. 670 (1874). A subscription for bonds, the amount being payable on call, may be paid at once and the bonds demanded. *Watjen v. Green*, 48 N. J. Eq. 322 (1891). A stockholder who offers to pay his subscription in full, which offer is declined by the corporation, is not thereby released from his obligation if he continues to act as a stockholder. *Potts v. Wallace*, 146 U. S. 689 (1892).

⁴ *Lock v. Queensland, etc. Co.*, 73 L. T. Rep. 708 (1896). Where the purchase price of stock is to be in ten equal payments, and interest is to be allowed if payment is made in advance, the interest may be collected. *Porter v. Beacon Constr. Co.*, 154 Pa. St. 8 (1893). A company may legally pay interest on such part of the subscription as is paid in before

does not bear interest unless the note itself so provides, especially where no call on the subscription has been made.¹ Where, pending an appeal from a decree ordering a person to turn stock over to another, the former pays assessments on the stock, he cannot recover these assessments from the latter if the decree is affirmed.²

§ 107. *New York rule*.—In New York it seems that a peculiar rule prevails. In that state there is a tendency to hold that no call is necessary before suit is brought on a subscription for stock. The subscriber's obligation to pay, and the time and manner of payment, must be sought for in the contract itself. Unless the contract provides for calls, the subscription is payable absolutely and at once, or as soon as the corporation is duly organized.³ Accordingly, in an action brought to collect a subscription, it is not necessary to allege that a call has been made, unless the terms of the subscription or the provisions of the corporate charter expressly provide for calls. These rules, however, seem not to have been directly passed upon in New York, and it is doubtful whether they can be considered as clearly established in that state.⁴

required by calls. Such interest may be paid although there are no profits. *Lock v. Queensland, etc. Co.*, [1896] A. C. 461.

¹ *Seattle T. Co. v. Pitner*, 51 Pac. Rep. 1048 (Wash., 1898).

² *Irvine v. Angus*, 84 Fed. Rep. 127 (1897).

³ *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857); *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 300 (1876). In the former case, however, calls were made and notice given by advertisement in a newspaper. In the latter case, by the terms of the charter, all subscriptions were due at the time when suit was commenced. Hence, in both cases, the statements in reference to calls have the appearance of *dicta*. In *Mann v. Pentz*, 3 N. Y. 415 (1850), it was held that a receiver could not collect uncalled subscriptions, since "the only condition upon which he (the sub-

scriber) could have been made liable to the corporation was by regular calls made in pursuance of the charter." See also *Bouton v. Dry Dock, etc. Co.*, 4 E. D. Smith, 420 (1855); *Seymour v. Sturgess*, 26 N. Y. 134 (1862); *Savage v. Medbury*, 19 N. Y. 32 (1859); *Williams v. Meyer*, 41 Hun, 545 (1886); *Howland v. Edmonds*, 24 N. Y. 307 (1862).

⁴ These rules seem to be peculiar to New York. The decisions in some of the other states hold, however, that no notice of calls is necessary. See § 117, *infra*. Practically, such a rule is equivalent to requiring no call at all, since in both cases collection is made only by direction of the directors or other officers, and in both cases the subscriber need not be informed of such directions. No notice of a call need be given before enforcing the same. *United Growers Co. v. Eisner*, 23 N. Y. App. Div. 1 (1897).

§ 108. *In case of corporate insolvency no call is necessary.*—When a corporation becomes insolvent, and there exist subscriptions which have not been fully paid in, the directors frequently neglect or refuse to make the calls necessary for the purpose of paying the corporate debts. In such cases a court of equity will disregard the formality of a call, and will order the unpaid subscriptions to be paid to a receiver for the benefit of the corporate creditors.¹ The courts very properly hold that

¹ "It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it." *Scovill v. Thayer*, 105 U. S. 143 (1881); *Glenn v. Williams*, 60 Md. 93 (1882); *Glenn v. Semple*, 80 Ala. 159 (1885). "A company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor." *Hatch v. Dana*, 101 U. S. 205 (1879). No call is necessary before stockholders are liable to creditors on their unpaid subscription, even though the charter provides for a call. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515 (1890). See also *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411 (1874); *Sanger v. Upton*, 91 U. S. 56 (1875); *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1879). Where the corporation, being indebted, has the power to call, and does not choose to exercise it, equity at the instance of creditors will exercise it. *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800; *Boepler v. Menown*, 17 Mo. App. 447 (1885); *Adler v. Milwaukee, etc. Mfg. Co.*, 13 Wis. 57 (1860); *Glenn v. Dodge*, 3 Cent. Rep. 283 (1885); *Great Western Tel. Co. v. Gray*, 122 Ill. 630 (1887); *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593 (1844); *Miller's Case*, 54 L. J. (Ch.) 141 (1884); *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1848); *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859); *Curry v. Woodward*, 53 Ala. 371 (1875); *Chandler v. Keith*, 42 Iowa, 99 (1875); *Shockley v. Fisher*, 75 Mo. 498 (1882). The filing of the bill in the suit in equity is equivalent to a call. *Hatch v. Dana*, 101 U. S. 205 (1879); *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 245 (1885). See also *Yeager v. Scranton, etc. Bank*, 14 Weekly N. Cas. 296 (1884). It is settled law that a decree in a chancery suit is equivalent to a call. *Glenn v. Saxton*, 68 Cal. 353 (1886). If the court orders that notice of the call be given, the receiver cannot collect by suit unless such notice is given. *Franklin Savings Bank v. Fatzinger*, 4 Atl. Rep. 912 (Pa., 1886). Where the whole of the unpaid subscriptions are needed to pay corporate debts, no assessment, even by the court, is necessary. But, unless the evidence clearly shows such necessity, it is for the jury to say whether the whole unpaid subscription shall be paid. *Citizens', etc. Co. v. Gillespie*, 115 Pa. St. 564 (1887), citing cases. See § 207, *infra*. Where an assignment is made by the corporation for the benefit of creditors, the statute of limitations begins to run within a reasonable time, even if no call is made. *Glenn v. Dorsheimer*, 24 Fed. Rep. 536 (1885). *Cf.* § 195, *infra*. In Missouri it has been held that there can be no garnishment of an unpaid subscription until after a call has been made. *Parks v. Heman*, 7 Mo. App. 14 (1879). In New York there are a few *dicta* to the effect

it is not discretionary with the directors to say whether the company's debts shall be paid or not. And this is the rule even though the statute provides that calls shall be made by the directors.¹ A call may be made by the court, and its discretion in that respect cannot be contested.²

There has been some doubt as to whether the writ of *mandamus* would lie to compel the directors to make the call;³ but the authorities seem to hold that the writ will not lie for this purpose. The usual procedure to collect unpaid subscriptions is an order of a court of equity made in a suit brought by cor-

that calls by the directors are necessary before unpaid subscriptions can be enforced for the benefit of corporate creditors. *Seymour v. Sturgess*, 26 N. Y. 134 (1862); *Mann v. Pentz*, 3 N. Y. 415 (1850). But the prevailing rule is sustained in *Sagory v. Dubois*, 3 Sandf. Ch. 466 (1846), where the court says: "The articles, it is true, in effect require that calls should be made by the directors, and probably the association could not maintain an action at law until such calls were regularly made; but that does not impair the remedy in behalf of the receiver." An assignee for the benefit of creditors of a corporation may collect a subscription without any call. *McKay v. Elwood*, 12 Wash. 579 (1895). Where by a decree a company is ordered to pay the subscriptions to its stock to one of its creditors, the attorney for the company who collects the subscriptions cannot retain them for his fees. *Gray v. Overby*, 37 S. W. Rep. 159 (Ky., 1896). No call is necessary where a corporate creditor files a bill to reach unpaid subscriptions. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (1897).

¹ *Glenn v. Saxton*, 68 Cal. 353 (1886); *Crawford v. Rohrer*, 59 Md. 599 (1882). *Contra*, *Louisiana Paper Co. v. Waples*, 3 Woods, 34 (1877); S. C., 15 Fed. Cas. 968, where the charter prescribed that calls should be only by a three-fourths vote of the stockholders.

² *Re Minnehaha, etc. Assoc.*, 53 Minn. 423 (1893).

³ "A chancellor will compel the directors to make the calls required by the charter whenever his aid is invoked by creditors or the representative of creditors." *Germantown Pass. R'y v. Fidler*, 60 Pa. St. 124 (1869). The three English cases usually cited on this point do not hold that a *mandamus* lies herein. *Queen v. Victoria Park Co.*, 1 Q. B. 288 (1841); *Queen v. Ledgard*, 1 Q. B. 616 (1841); *Rex v. Katharine Dock Co.*, 4 B. & Ad. 360 (1832). In the case of *Dalton, etc. R.R. v. McDaniel*, 56 Ga. 191 (1876), the court held that a *mandamus* was unnecessary, on the ground that the remedy by bill was easier and more complete, and that justice would be better administered in this way by an account of all the corporate debts, and of all liabilities of solvent stockholders, taken by a master in chancery. In *Hatch v. Dana*, 101 U. S. 205 (1879), the court says a *mandamus* "can avail only when there are directors. The remedy in equity is more complete." In *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593 (1844), the court refused a *mandamus* because it would enforce the collection of only a few debts, whereas the remedy in equity would enforce all proportionately.

porate creditors for the purpose of applying corporate assets to corporate debts.¹ The court may direct the receiver to make a call instead of the court making the call itself directly.²

§ 109. *Who has authority to make calls.*—A call, in order to be legal and enforceable, must be made by the proper corporate authorities. Generally, the power to make calls is vested in the directors or in the stockholders at large. Unless the charter or a statute makes provision therefor, the question as to who shall make calls is a question of internal arrangement. If no provision whatever is made for the exercise of the power it devolves upon the directors, on the general principle that they alone have power to manage and superintend the financial matters of the corporation and to exercise all corporate powers, except those required to be exercised at corporate meetings.³ Even though the statute authorizes calls by the stockholders, yet the directors also have the same power.⁴

§ 110. *Calls by directors.*—Where the power to make calls is vested in the directors, a call made by those who are directors *de facto* will be upheld.⁵ The directors, in whom the power to

¹ "Under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment." *Scovill v. Thayer*, 105 U. S. 143 (1881). In bankruptcy, it seems, the assignee, by succeeding to all the rights of the corporation, may make a call and enforce it. *Hatch v. Dana*, 101 U. S. 205 (1879). See also §§ 202, 207, *infra*. At common law a court of equity could not make calls for benefit of corporate creditors. *Dictum*, *Grain's Case*, L. R. 1 Ch. D. 307, 323 (1875).

² *Falk v. Whitman, etc. Co.*, 36 Atl. Rep. 1094 (N. J., 1897).

³ *Budd v. Multnomah St. R'y*, 15 Oreg. 413 (1887). The directors may make calls "as they may do all things, except such as are to be done by the shareholders at a general meet-

ing." *Ambergate, etc. R'y v. Mitchell*, 4 Exch. 540 (1849).

⁴ *Ambergate, etc. R'y v. Mitchell*, 4 Exch. 540 (1849). In *Ex parte Winsor*, 3 Story, 411 (1844); S. C., 30 Fed. Cas. 312, it was held, however, that where the charter gave to the corporation the power to assess stock it must be exercised exclusively by the stockholders in meeting assembled. On the other hand, in *Rives v. Montgomery, etc. Co.*, 30 Ala. 92 (1857), the court held that stockholders who by charter have power to make calls may delegate that power to the directors. See also *Healey on Companies*, 3d ed., p. 125.

⁵ "An illegal election of directors cannot be set up in resistance of the payment of stock, but would be a case for a *quo warranto* to oust the illegally elected directors." *Eakright v. Logansport, etc. R. R.*, 13 Ind. 404 (1859); *Johnson v. Crawfordsville, etc. R. R.*, 11 Ind. 280 (1858); *Fairfield*

make calls is vested, cannot delegate their authority.¹ It is a power the exercise of which involves a discretion which cannot be exercised by others. A call by a minority meeting of the directors, no quorum being present, is void.²

County Turnp. Co. v. Thorp, 13 Conn. 173 (1839); Steinmetz v. Versailles, etc. Turnp. Co., 57 Ind. 457 (1877); Macon, etc. R. R. v. Vason, 57 Ga. 314 (1876); Atherton v. Sugar Creek, etc. Turnp. Co., 67 Ind. 334 (1879). In People's Mut. Ins. Co. v. Westcott, 80 Mass. 440 (1860), however, a call by directors elected at a meeting held without notice was declared invalid and not enforceable. A call may be enjoined on the ground that the directors were illegally elected. Moses v. Tompkins, 84 Ala. 613 (1888). A call cannot be enjoined on the ground that the *de facto* board is not a *de jure* board. Chandler v. Sheep, etc. Co., 49 Pac. Rep. 535 (Utah, 1897). In England the courts will inquire into the right of directors to their office, in cases involving the validity of calls. Swansea Dock Co. v. Levien, 20 L. J. (Ex.) 447 (1851). If the directors were not legally elected, their calls and forfeitures of stock based thereon will be set aside. Garden Gully, etc. Co. v. McLister, L. R. 1 App. Cas. 39 (1875). See Healey on Companies, 3d ed., p. 126. If the corporate organization was not regular, and the directors were not legally elected, their call is not enforceable. Howbeach Coal Co. v. Teague, 5 Hurlst. & N. 151 (1860). Directors elected at a meeting called on thirteen days' notice instead of fourteen as required by statute may make calls, where their election has been confirmed by a subsequent annual general meeting. Briton, etc. Assoc. v. Jones, 61 L. T. Rep. 384 (1889).

¹ Rutland, etc. R. R. v. Thrall, 35 Vt. 536 (1863), the court saying: "When a charter requires the di-

rectors to do some specific act, there seems to be a stronger reason why they should be held incapable of delegating such authority than when mere general powers are conferred on them." See also Banet v. Alton, etc. R. R., 13 Ill. 504 (1851); Pike v. Bangor, etc. R. R., 68 Me. 445 (1878); Re Bolt & Iron Co., 10 Pr. R. (Can.) 434 (1884); Silver Hook Road v. Greene, 12 R. I. 164 (1878), where it was delegated to the treasurer; Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341 (1876), citing authorities; Monmouth, etc. Ins. Co. v. Lowell, 59 Me. 504 (1871). But where the power is delegated and exercised, the call may be ratified by the directors, and will then be valid. Read v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545 (1872); Rutland, etc. R. R. v. Thrall, 35 Vt. 536 (1863). Although the directors cannot delegate the power to make a call, yet they may delegate the power "to determine the amount of some of the instalments, and to designate the times of payment." Banet v. Alton, etc. R. R., 13 Ill. 504 (1851). It is not necessary to allege that the directors were duly elected. Miller v. Wild Cat, etc. Co., 52 Ind. 51 (1875); Steinmetz v. Versailles, etc. Turnp. Co., 57 Ind. 457 (1877). But proof must be given that the proper authorities made the call. New Jersey Midland R'y v. Strait, 35 N. J. L. 322 (1872).

² Price v. Grand Rapids, etc. R. R., 13 Ind. 58 (1859); Hamilton v. Grand Rapids, etc. R. R., 13 Ind. 347 (1859); Bottomley's Case, L. R. 16 Ch. D. 681 (1880). But may be confirmed by a quorum. Re Phosphate of Lime Co., 24 L. T. 932 (1871).

§ 111. *Assignment of subscriptions by corporation before or after call.*—The unpaid and uncalled subscriptions for stock cannot be mortgaged or sold by the corporation. If the transfer by the directors were allowed, “the consequence would be that the discretion which they are bound to exercise would be wholly defeated and put an end to.”¹ The power of making calls, being a discretionary one, cannot be transferred to other parties. The transfer is void. The subscribers are bound to pay their subscriptions only when, in the opinion of the proper corporate authorities, or of a court of equity, the money is needed for corporate purposes. This power of ascertaining and determining the extent of the corporate needs, being a discretionary power, cannot be transferred or delegated to others. A different rule prevails, however, after a call has been made but not yet collected, and an assignment of the amount already called is legal and valid.² The usual railroad mortgage does

¹ *Ex parte Stanley*, 33 L. J. (Ch.) 535 (1864); *Re Sankey Brook Coal Co.*, L. R. 10 Eq. 381 (1870). To the same effect, see *New Jersey Midland R’y v. Strait*, 35 N. J. L. 322 (1872); *Wells v. Rodgers*, 50 Mich. 294 (1883); S. C., 44 Mich. 411 (1886), involving the consolidation of two railroads. See also *Crooks v. State*, 4 N. E. Rep. 589 (Ind., 1866); *Wallingford Mfg. Co. v. Fox*, 12 Vt. 304 (1840); *Bank of South Australia v. Abrahams*, L. R. 6 P. C. App. 265 (1875); *Hurlbut v. Root*, 12 How. Pr. 511 (1855); *Hill v. Reid*, 16 Barb. 280 (1853); *Hurlbut v. Carter*, 21 Barb. 221 (1855). *Cf. Smith v. Hollett*, 34 Ind. 519 (1870), where the subscription was not for stock, but as a bonus. The articles of incorporation of a company may authorize a mortgage on unpaid and uncalled subscriptions. *Re Pyle Works*, L. R. 44 Ch. D. 534 (1890).

² *Re Humber Iron-works Co.*, 16 Weekly Rep. 474, 667 (1868); *Wells v. Rodgers*, 50 Mich. 294 (1883); *Miller v. Malony*, 3 B. Mon. (Ky.) 105 (1842), where the call was assigned to the contractor who owed the subscriber for work done; *Downie v. Hoover*, 12

Wis. 174 (1860); *Morris v. Cheney*, 51 Ill. 451 (1869), where, however, it is not clear that a call had been made. A call which has been determined upon, but not definitely made, may be transferred if it is afterwards duly made by the directors. *Re Sankey Brook Coal Co.*, L. R. 9 Eq. 721 (1870). See S. C., L. R. 10 Eq. 381. As to the enforcement of a subscription by a subsequently created corporation formed by consolidation, see ch. LIII. A mortgage on all the land, property, and effects of the corporation does not include uncalled subscriptions. *King v. Marshall*, 33 Beav. 565 (1864). *Cf. Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867); *Re British Prov. L. Ins. Co.*, 4 De G., J. & S. 407 (1864); *Gardner v. London, etc. R’y Co.*, L. R. 2 Ch. 201, 215 (1867); *Pickering v. Ilfracombe R’y*, 37 L. J. (C. P.) 118 (1868); *Lishmann’s Claim*, 23 L. T. Rep. (N. S.) 759 (1870). An assignee of unpaid subscriptions may assign to still another. *Rand v. Wiley*, 70 Iowa, 110 (1886). As to the right of one road built on the line of an abandoned road to recover on a private donation to the latter, see

not cover subscriptions for stock in the sense of preventing the corporation from collecting them.¹

§ 112. *Interest runs from the time the call is due.*—A subscriber who has failed to pay for his shares according to the terms of his contract is properly chargeable with interest from the time of the default.² The interest is recoverable, however, not from the date of the call, but from the date of the notice to the stockholder.³

§ 113. *Stockholders cannot question advisability of call.*—The necessity or advisability of making a call is a matter which rests exclusively within the discretion of the corporate authorities who have power to make the call.⁴ A stockholder, when sued upon an unpaid call, cannot set up in defense that there was no occasion or use for the money. Whether made by the court or by the directors, the call is conclusive evidence of the necessity therefor unless directly attacked and set aside by judicial proceedings.⁵ The call, however, must be for the *bona fide* purpose of raising money for corporate purposes. It must not be for the purpose of enabling the stockholders to use the money to the detriment of the creditors of the failing corpora-

Sickels v. Anderson, 63 Mich. 421 (1886). The assignee of the right of a corporation to collect a subscription may collect it the same as the corporation could. *Chattanooga, etc. R. R. v. Warthen*, 98 Ga. 599 (1896). A subscriber is liable although the company under its charter sells its railroad to another company, the subscription being payable to the company and its assigns. The subscriber is entitled to stock in the successor company. *Chattanooga, etc. R. R. v. Warthen*, 98 Ga. 599 (1896). Where a corporation assigns a subscription for stock, the receiver of the corporation is not a necessary party to a suit to collect the subscription. *Coler v. Grainger County*, 74 Fed. Rep. 16 (1896).

¹ See § 852, *infra*.

² *Gould v. Oneonta*, 71 N. Y. 298 (1877); *Rikhoff v. Brown's, etc. Machine Co.*, 68 Ind. 388 (1879); *Casey v. Galli*, 94 U. S. 673 (1876). See also

Burr v. Wilcox, 22 N. Y. 551 (1860). *Cf. Stocken's Case*, L. R. 5 Eq. 6 (1867); *Cleveland v. Burnham*, 55 Wis. 598 (1882). In *Liggett v. Glenn*, 51 Fed. Rep. 381 (1892), interest was allowed only from the date of suit and not from the date of the call.

³ *Hambleton v. Glenn*, 72 Md. 331 (1890). Interest on the instalment cannot be recovered if no notice of the call was given. *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41 (1894).

⁴ The question of the necessity for the call "was a matter for the determination of the board of directors." *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286 (1881). "The question whether those necessities demanded the payment of the money was for the directors." *Judah v. American, etc. Ins. Co.*, 4 Ind. 333 (1853); *Budd v. Multnomah St. R'y*, 15 Oreg. 413 (1887).

⁵ *Great Western Tel. Co. v. Purdy*, 162 U. S. 329 (1896).

tion.¹ Moreover, a court of equity will set aside calls and payments made and managed with a view to discharging the stockholders' liability and preventing the proceeds from being applied to the general corporate debts. Equity, however, will not interfere with a call merely because the money received may be diverted by the directors to an act or enterprise beyond the powers of the corporation.² The corporation cannot contract to postpone indefinitely a call.³ To allow such postponement would be unjust to corporate creditors and other stockholders.

§ 114. *Calls must be impartial and uniform.*—A call cannot be made so as to affect a part only of the subscribers. It must be made on all alike or it will be void.⁴ The courts will not allow the directors of a company so to proceed as to require some stockholders to pay calls, and not to require others to do the same. Any such attempt will be promptly set aside and rectified.⁵ If, however, some stockholders have already con-

¹ Habershon's Case, L. R. 5 Eq. 286 (1868). Thus, where the amount paid in is immediately paid out to the directors for fees, the transaction is fraudulent, and is set aside. Sykes's Case, L. R. 13 Eq. Cas. 255 (1872). On the other hand, the directors cannot delay calls in order to enable themselves to transfer their stock and avoid liabilities. Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Preston v. Grand Collier Dock Co., 11 Sim. 327 (1840).

² In the case of Bailey v. Birkenhead, etc. R'y, 12 Beav. 433 (1850), the court said it is not within the jurisdiction of courts "to take the accounts and make the inquiries necessary for the purpose of ascertaining whether, under the circumstances to which the company is reduced, and in a continuing concern, it is proper, in the due management of the affairs of the company, to raise money by way of calls from the shareholders." Corporate meetings are the places for such complaints. See also Yetts v. Norfolk R'y, 3 De G. & Sm. 293 (1849).

³ McComb v. Credit Mobilier, 13 Phila. 468 (1878); Van Allen v. Illinois Cent. R. R., 7 Bosw. 515 (1861) — the last case holding, however, that this principle does not prevent the issue of bonds convertible into stock whenever the stockholder desires.

⁴ Pike v. Bangor, etc. R. R., 68 Me. 445 (1878). One cannot object to a call on the ground that the motives of the directors were wrong. Oglesby v. Attrill, 105 U. S. 605 (1881). A suit to collect thirty-five per cent of a subscription fails where other subscribers have paid but two per cent. Great Western Tel. Co. v. Burnham, 79 Wis. 47 (1891); Bowen v. Kuehn, 79 Wis. 53 (1891).

⁵ Preston v. Grand Collier Dock Co., 11 Sim. 327 (1840). If directors use their power to make calls oppressively, they will be restrained. Cannon v. Trask, L. R. 20 Eq. 669 (1875). As where the object is to disqualify from voting those who cannot pay. Anglo, etc. Bank v. Baragnon, 45 L. T. 362 (1881).

tributed more than others, the new call may equalize the contributions.¹

§ 115. *Method of making calls—No formalities necessary.*—There are no prescribed or established rules stating how a call shall be made by the corporate authorities empowered to make it. Any act or resolution which in a court of law would prove a clear official intent to render due and payable a part or all of the unpaid subscriptions seems to be sufficient.² A mere street conversation, however, between the directors, by which they “agree” that subscriptions shall be called, is not a sufficient call.³ The call need not indicate when, or to whom, or where, payment is required to be made.⁴ These are to be stated in the notice of the call.⁵ Mere irregularities are disregarded, and will not invalidate the call.⁶ The substantial fact must exist that the proper corporate officers voted or declared that payment be required. Hence the elements of a call seem to be

¹ *Brockway v. Gadsden, etc. Co.*, 102 Ala. 620 (1894).

² *Budd v. Multnomah St. R'y*, 15 Oreg. 413 (1887); *Citizens', etc. Ins. Co. v. Sortwell*, 92 Mass. 110, 112 (1865).

³ *Branch v. Augusta Glass Works*, 95 Ga. 573 (1895).

⁴ Quoted and approved in *Germania Iron Min. Co. v. King*, 94 Wis. 439 (1896); *Fox v. Allensville, etc. Turnp. Co.*, 46 Ind. 31 (1874); *Andrews v. Ohio, etc. R. R.*, 14 Ind. 169 (1860). In the case of *Great North. etc. R'y v. Biddulph*, 7 M. & W. 243 (1840), Baron Parke held that the resolution for a call need not state the place of payment nor the person to whom it was payable. Compare *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863), to the effect that the place must be stated. Call made in a new name, legally assumed by the corporation, is binding on subscribers who knew of the change of name. *Shackleford v. Dangerfield*, L. R. 3 C. P. 407 (1868).

⁵ Quoted and approved in *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41 (1894), where the omission in the call to state where and to whom the call was payable was held not

fatal, even though the charter seemed to require those facts to be stated; and holding also that it is sufficient if the notice of the call states those facts.

⁶ Irregularities are no defense. The remedy is to revoke or set aside the call. “Calls *in fact* made, means that if made, and notice be given, . . . a party shall not wait to take advantage of any irregularity at the trial.” *Re British Sugar Ref. Co.*, 3 K. & J. 408 (1857); *Southampton Dock Co. v. Richards*, 2 Railw. Cas. 215, 234 (1840); S. C., 1 Man. & Gr. 448. See also *Shackleford v. Dangerfield*, L. R. 3 C. P. 407 (1868). An error in the call may be corrected and cured by a subsequent call made after the first liability accrued but before suit. *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857). A director who participated in making the call cannot set up informalities for the purpose of defeating it. *Hays v. Pittsburgh, etc. R. R.*, 38 Pa. St. 81 (1860). Payment and acquiescence in informality as to one call waives it as to another call. *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876).

that it shall be by the proper persons acting officially; and that a resolution, susceptible of legal proof,¹ be passed that a certain amount, either the whole or part,² of the subscriptions for stock shall be paid in. If the statute prescribes the form of the call this form must be followed.³ The validity of calls by an English corporation is determined by English law.⁴

§ 116. *Time, place, amount, and person to whom payable.*—The time and place and person to whom calls are to be paid need not necessarily be designated or fixed by the persons authorized to make the call.⁵ These are duties which may be performed by other officers of the corporation, and frequently either the president or treasurer of the corporation performs this work. The time of payment should be reasonable,⁶ as also

¹ A call by the directors is valid although no entry of the resolution is made in the minutes of the directors' meeting. *Hays v. Pittsburgh, etc. R. R.*, 38 Pa. St. 81 (1860). An entry of the resolution, made by the secretary in the book containing the minutes, is sufficient. *Fox v. Allensville, etc. Turnp. Co.*, 46 Ind. 31 (1874). An authorized subsequent call is competent proof of the validity of a previous call. *Bavington v. Pittsburgh, etc. R. R.*, 34 Pa. St. 358 (1859). The corporate books are competent to prove both the call and the mode of payment. *Bavington v. Pittsburgh, etc. R. R.*, 34 Pa. St. 358 (1859); *Comfort v. Leland*, 3 Whart. (Pa.) 81 (1837).

² The call may be for the whole subscription. *Fox v. Allensville, etc. Turnp. Co.*, 46 Ind. 31 (1874). May be for the whole or for part. *Haun v. Mulberry, etc. Co.*, 33 Ind. 103 (1870); *Stone v. Great Western Oil Co.*, 41 Ill. 85 (1866); *Spangler v. Indiana, etc. R. R.*, 21 Ill. 276 (1859); *Ross v. Lafayette, etc. R. R.*, 6 Ind. 297 (1855). Even though it be expressly provided that only a certain sum shall be assessed at one time, yet several assessments, each one not in excess of the stated sum, may be ordered by a single vote. *Penobscot R. R. v. Dummer*, 40 Me.

172 (1855); *Penobscot, etc. R. R. v. Dunn*, 39 Me. 587 (1855).

³ *Germania Iron Min. Co. v. King*, 94 Wis. 439 (1896).

⁴ *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41 (1894).

⁵ See § 115, note 4, *supra*. The directors themselves may fix the time, place, and manner of payment, even at a meeting subsequent to the meeting ordering a call. The call may be prospective. The directors may order that on a certain date a call payable at a later date shall be made. *Sheffield, etc. R'y v. Woodcock*, 7 M. & W. 574 (1841). The subscription itself may regulate the time of payment. *New Jersey Midland R'y v. Strait*, 35 N. J. L. 322 (1872); *Roberts v. Mobile, etc. R. R.*, 32 Miss. 373 (1856). Even though the statute provides otherwise. *Iowa, etc. R. R. v. Perkins*, 28 Iowa, 281 (1869). A call need not name any time, place, or person to whom payment must be made. Unless otherwise specified the call is payable on demand at the office of the company and to an officer authorized to receive payment. *Western Imp. Co. v. Des Moines Nat. Bank*, 73 N. W. Rep. 657 (Iowa, 1897).

⁶ *Fairfield County Turnp. Co. v. Thorp*, 13 Conn. 173 (1839). The time

should be the place. A provision in the by-laws that the subscriptions should be called in at certain times only may be modified. A company cannot contract not to alter its by-laws.¹ If no place or person to receive payment is designated, it is to be paid to the treasurer at his office.² The amount called need not be made payable in one sum at one time, but may be made due in instalments.³

§ 117. *Notice of calls — Cases holding it not necessary.*— There is a wide and irreconcilable difference of opinion among the authorities on the question whether notice of a call must be given to a stockholder before suit can be brought for the collection of a call.

Frequently either the charter, or a statute, or the by-laws of the corporation, require notice to be given; and in such cases notice is, of course, necessary, in order to sustain suit.⁴ But

between payments of instalments is entirely within the discretion of the directors, there being no provision regulating the subject. *Hall v. United States Ins. Co.*, 5 Gill (Md.), 484 (1847).

¹ *Malleson v. National, etc. Corp.*, 70 L. T. Rep. 157 (1893).

² A resolution of the directors that the instalments should be paid in "at the times therein designated imports that payments should be made to the treasurer, who is the proper and only officer to receive and keep the moneys of the corporation." *Danbury, etc. R. R. v. Wilson*, 22 Conn. 435 (1853). As to a tender to the president, see *Mitchell v. Vermont, etc. Co.*, 67 N. Y. 280 (1876). Directors in making a call should specify the place of payment. *Provident, etc. Co. v. Wilson*, 25 Q. B. Rep. (Can.) 53 (1866).

³ *Northwestern R'y v. McMichael*, 6 Exch. 273 (1851); *Birkenhead, etc. R'y v. Webster*, 6 Exch. 277 (1851); *Ambergate, etc. R'y v. Norcliffe*, 6 Exch. 629 (1851), not following *Stratford, etc. R'y v. Stratton*, 2 B. & Ad. 519 (1831). In *Birkenhead, etc. R'y v. Webster*, as reported in 6 Exch.

277 (1851), the court say: "We are unanimously of opinion that a call payable by instalments is good, although debt will not lie for one instalment until all the instalments are due and payable." In *Hays v. Pittsburgh, etc. R. R.*, 38 Pa. St. 81 (1860), the court held that the directors by one resolution could call in the balance of the subscriptions, making the call payable in instalments, due at different times. To the same effect, see *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *Lewis's Case*, 28 L. T. (N. S.) 896 (1873).

⁴ In many of the states there exist statutes, very similar in their terms, that notice shall be given of calls, and that in case of non-payment the stock may be forfeited. These statutes have received different interpretations in different states. The usual construction is that the notice required therein refers only to the forfeiture proceedings, and does not necessitate notice before bringing a suit at law for the collection of the call. *Smith v. Indiana, etc. R'y*, 12 Ind. 61 (1859); *Lake Ontario, etc. R. v. Mason*, 16 N. Y. 451, 464 (1857). In other states such a statute is con-

where there is no provision in the charter, or statute, or by-laws, or subscription itself, prescribing that notice of calls shall be given to the stockholders, the weight of authority holds that no notice is necessary, and that an action to collect the call may be maintained without averring or proving such a notice.¹

§ 118. *Notice of calls — Cases holding it necessary.*— There is, however, strong authority for the rule that notice of calls must be given before suit is brought for their collection.² The reason for this rule seems to accord with sound legal principles and with business expediency. It is a well-established principle of law that, when the facts or circumstances upon which the

strued to require notice before suit. *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Granite Roofing Co. v. Michael*, 54 Md. 65 (1880); *Dexter, etc. Co. v. Millerd*, 3 Mich. 91 (1854). *Illinois River R. R. v. Zimmer*, 20 Ill. 654 (1858), holds that a statute regulating notice of calls does not release the stockholder.

¹ *Wilson v. Wills Valley R. R.*, 33 Ga. 466 (1863); *Eppes v. Mississippi, etc. R. R.*, 35 Ala. 33 (1859); *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 302 (1850); *Gray v. Monongahela Nav. Co.*, 2 W. & S. (Pa.) 156 (1841); *Grubbs v. Vicksburg, etc. R. R.*, 50 Ala. 398 (1873); *Eakright v. Logansport, etc. R. R.*, 13 Ind. 404 (1859); *Johnson v. Crawfordsville, etc. R. R.*, 11 Ind. 280 (1858); *New Albany, etc. R. R. v. McCormick*, 10 Ind. 499 (1858); *Fisher v. Evansville, etc. R. R.*, 7 Ind. 407 (1856); *Ross v. Lafayette, etc. R. R.*, 6 Ind. 297 (1855); *Hill v. Nisbet*, 100 Ind. 341 (1884); *Smith v. Indiana, etc. R'y*, 12 Ind. 61 (1859). In the last case the court said: "These decisions rest upon the ground that the contract to pay by instalments is in effect a promise to pay on demand, and that the demand involved in the suit itself was alone sufficient." Notice of calls is required by the Pennsylvania railroad act. *McCarty v. Selinsgrove, etc. R. R.*, 35 Leg. Int. 410 (1878). In

New York, since no call is necessary, no notice is necessary. *Cf. Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876).

² *Wear v. Jacksonville, etc. R. R.*, 24 Ill. 593 (1860); *Spangler v. Indiana, etc. R'y*, 21 Ill. 276 (1859). *Cf. Peake v. Wabash R. R.*, 18 Ill. 88 (1856), holding that notice is unnecessary. In the case of *Carlisle v. Cahawba, etc. R. R.*, 4 Ala. (N. S.) 70 (1842), the court say that notice must be given, since "the times, amount of instalments, and manner of payment were all to be prescribed by the president and directors of the corporation, depended upon their volition and action, and consequently were more properly within their knowledge." See also *Scarlet v. Academy of Music*, 43 Md. 293 (1875); *Essex Bridge Co. v. Tuttle*, 2 Vt. 393 (1830); *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *Miles v. Bough*, 3 Q. B. 845 (1842); *Edinburgh, etc. R'y v. Hebblewhite*, 6 M. & W. 707 (1840); *Alabama, etc. R. R. v. Rowley*, 9 Fla. 508 (1861). In *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870), the court says: "To say that it [notice] is unnecessary, because the subscribers, who may be living in different parts of the county, and perhaps the state, are presumed in law to know all that is done by the directory, seems to us to be raising a presumption against the truth itself."

performance of a contract depends lie more particularly in the knowledge of the promisee than the promisor, the former must give the latter notice. Hence it would seem that since a subscription is not due absolutely, but only on call, and the time, place and amount of the call is fixed by persons other than the subscribers, the better and more reasonable rule would be that notice of the call should be required and must be given.

§ 119. *Methods of serving notice of calls.*—The manner and mode of giving notice has given rise to some controversy. Unless provision is expressly otherwise, the notice must be given by handing to the subscriber a written notice, or by informing him orally that the call has been made, giving the amount, time, place, and person to whom payment is to be made.¹ Where the notice is served, not personally, but by mail, the notice is effective only in case it is actually received.² Whether it was so received is a question for the jury.³ A publication of a notice in a newspaper is not binding and effectual unless it be proved that the subscriber who is sued actually read the notice as published.⁴ A personal notice is sufficient, although

¹ The notice need not be written. Verbal notification suffices. *Smith v. Tallassee, etc. Co.*, 30 Ala. 650, 666 (1857). Notice to pay to the treasurer sufficiently indicates the place of payment. It is understood to be at his office. *Muskingum, etc. Co. v. Ward*, 13 Ohio, 120 (1844). *Contra*, *Dexter, etc. Co. v. Millerd*, 3 Mich. 91 (1854). It must be proved to have been signed by authorized persons. *Miles v. Bough*, 3 Q. B. 845 (1842). Notice to various parties in the neighborhood is not sufficient. *New Jersey Midland R'y v. Strait*, 35 N. J. L. 322 (1872). No particular form of notice is necessary. The only question is "whether the notice gives the shareholder to understand that a call has been made, and that he is required to pay the amount on a given day." *Shackleford v. Dangerfield*, L. R. 3 C. P. 407 (1868).

² "Constructive notice by the mail is not a personal notice, although in some cases, by express statutory pro-

vision, it is sufficient to bind parties." *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870).

³ A notice of a call may be by mail. If the subscriber denies that he received it, the question is for the jury. *Braddock v. Philadelphia, etc. R. R.*, 45 N. J. L. 363 (1883). Only the person actually mailing the notice can testify to that fact. *Jones v. Sisson*, 72 Mass. 288 (1856).

⁴ In *Alabama, etc. R. R. v. Rowley*, 9 Fla. 508 (1861), the court says such a mode of notice "might be attended with irreparable injury to innocent parties." See also *dictum* in *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857). In *Schenectady, etc. Co. v. Thatcher*, 11 N. Y. 102 (1854), where the charter prescribed notice by publication or by mail, a director who aided in giving the notices was held to have had personal notice and to be bound. "Personal service of due notice is clearly more advantageous to the defendant than either an ad-

the charter, statute, or by-laws provide for notice by publication.¹ An express promise of the subscriber to pay a call which has been already made is presumptive evidence that he had notice of that call.² Notice by publication, given under the authority of a statute, charter, or by-law, must strictly comply with the provisions prescribed as to the time and formalities.³

vertisement in a newspaper or a notice sent by mail." See also *Lexington, etc. R. R. v. Chandler*, 54 Mass. 311 (1847). See also § 130, *infra*. Notice in a newspaper is not good notice unless the statute so prescribes. *People's, etc. Assoc. v. Furey*, 47 N. J. Eq. 410 (1890).

In the case of *Lincoln v. Wright*, 23 Pa. St. 76 — 1854 (not a corporation case), Judge Jeremiah Black said that a notice by publication in a newspaper was no notice unless actually read by the person charged with the notice. "It must be proved that he read it; otherwise it is no stronger than proof that the fact was orally and publicly uttered at a place where he was not present." On the other hand, in *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484 (1847), notice of a call by newspaper was held sufficient. The court said: "There is no proportionate object attained for the great inconvenience, labor, and expense incident to 'personal notice.' The substitution of such newspaper publications in lieu of personal notice has so long been an universal usage, and of a notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land." See also *Louisville, etc. Co. v. Meriwether*, 5 B. Mon. (Ky.) 13 (1844), to the same effect, and *dictum* in *Danbury, etc. R. R. v. Wilson*, 22 Conn. 435, 455 (1853), and §§ 130, 131, *infra*.

¹ In the case of *Mississippi, etc. R. R. v. Gaster*, 20 Ark. 455 (1859), the statute prescribed sixty days' notice by publication. Actual personal notice was given, and no publication

was had. The court sustained the notice and said: "One of the criterions by which to determine whether the requirements of a statute are imperative or merely directory is that those acts which are of the essence of the thing required to be done are imperative, while those which are not of the essence are directory. . . . The giving of sixty days' notice is imperative and must be strictly complied with, because it is of the essence of the thing required to be done; the mode of doing so is directory, because not of the essence, and may be either by publication in the manner prescribed by the charter or by actual personal notice." *Cf. semble*, in *Tomlin v. Tonica, etc. R. R.*, 23 Ill. 429, 436 (1860).

² *Miles v. Bough*, 3 Q. B. 845 (1842); *Fairfield County Turnp. Co. v. Thorp*, 13 Conn. 173 (1839).

³ Where twenty days' notice was required, proof of sending notice is insufficient. The time of sending must be proved. *Cole v. Joliet Opera House Co.*, 79 Ill. 96 (1875). Notice by publication "at least sixty days" is satisfied by one publication sixty days or more before the time of payment. *Muskingum, etc. Co. v. Ward*, 13 Ohio, 120 (1844); *Fox v. Allensville, etc. Turnp. Co.*, 46 Ind. 31 (1874). Fifty-nine days is insufficient where sixty days is prescribed. *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876). The printed notice must be put in evidence. *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863). A copy of the first insertion and the testimony of the publisher that the other insertions were duly made are *prima facie* evi-

§ 120. *Demand, waiver, pleadings, etc.*—After notice has been given, no demand is necessary before bringing a suit to collect the subscription.¹ The subscriber may, by his acts or express agreement, waive the call itself, or informalities in its making, or notice thereof.² It is immaterial that other shareholders have had no notice of the call.³ The proof of calls and of notice, when required, must be clear and complete.⁴ The pleadings in an action on calls must allege the various facts which complete the obligation of the subscriber to pay.⁵

dence of publication. *Unthank v. Henry County Turnp. Co.*, 6 Ind. 125 (1855). The secretary of the corporation cannot, by a certificate, prove publication of notice. *Tomlin v. Tonica, etc. R. R.*, 23 Ill. 429 (1860).

¹ *Penobscot R. R. v. Dummer*, 40 Me. 172 (1855); *Goodrich v. Reynolds*, 31 Ill. 490 (1863); *Winter v. Muscogee R. R.*, 11 Ga. 438 (1852). *Cf. Spangler v. Indiana, etc. R. R.*, 21 Ill. 276 (1859), holding that one demand made for several assessments suffices.

² *State Bank Bldg. Co. v. Pierce*, 92 Iowa, 668 (1894); *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876). Payment of part of a subscription is no waiver of the right to have a call made for the balance before payment. *Grosse Isle Hotel Co. v. P'Anson*, 43 N. J. L. 442 (1881). The vote of a city to pay a call is no waiver of its invalidity. *Pike v. Bangor, etc. R. R.*, 68 Me. 445 (1878). The waiver must be clearly proved. *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863). A director participating in a call cannot object thereto. *York Tramways Co. v. Willows*, L. R. 8 Q. B. D. 685 (1882). Where a subscriber, upon receiving notice of a call, denies that he is a stockholder,

he thereby waives further notice. *Cass v. Pittsburg, etc. R'y*, 80 Pa. St. 31 (1875).

³ *Newry, etc. R'y v. Edmunds*, 2 Exch. 118 (1848); *Shackleford v. Danglerfield*, L. R. 3 C. P. 407 (1868).

⁴ *Scarlett v. Academy of Music*, 43 Md. 203 (1875). This case holds also that calls may be proved by reading extracts from the minutes of the directors' meetings, without putting the books in evidence.

⁵ The company must allege that the instalments are all due and payable, where several are sued on. *Bethel, etc. Co. v. Bean*, 58 Me. 89 (1870). At common law the count set out in the declaration should be not on the contract of subscription, but in *indebitatus assumpsit* for calls or instalments due. *Peake v. Wabash R. R.*, 18 Ill. 88 (1856). For the customary averments, see *Spangler v. Indiana, etc. R. R.*, 21 Ill. 276 (1859). For the defendants' pleading, see *South Eastern R'y v. Hebblewhite*, 12 A. & E. 497 (1840). The call and notice may be pleaded in general language in the complaint. *Walter, etc. Co. v. Robbins*, 56 Minn. 48 (1893).

CHAPTER VIII.

FORFEITURE OF SHARES FOR NON-PAYMENT.

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| <p>§ 121. The various remedies.</p> <p>122-123. The remedy by forfeiture and sale of stock is by statutory authority only.</p> <p>124. The remedy by forfeiture is cumulative.</p> <p>125-126. Forfeiture relieves the shareholder whose shares are forfeited from liability to the corporation.</p> <p>127-128. Forfeiture relieves the shareholder whose shares are forfeited from liability to corporate creditors.</p> | <p>§ 129. Statutory formalities and general method of forfeiture.</p> <p>130. Notice in cases of forfeiture.</p> <p>131. Notice is not the same thing as forfeiture.</p> <p>132. Tender, by stockholder, before forfeiture.</p> <p>133. Surplus after valid forfeiture belongs to the corporation—Purchase by the corporation.</p> <p>134. Equity will relieve a shareholder from an unauthorized forfeiture—Action at law for damages.</p> |
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§ 121. *The various remedies.*—When a subscriber fails or refuses to pay for the shares of stock for which he has subscribed, the corporation generally has several methods of enforcing the contract. First, there is the common-law action to collect the subscription as a debt. This remedy always exists, except in a few states where it is available only when the subscription itself or the charter creates a liability to pay.¹ Second, the corporation may sue on the subscription, obtain judgment, and then proceed to sell the stock under an execution levied to collect the judgment.² Third, the corporation may bring an action at law for breach of contract, the measure of damages being the difference between the value of the stock at the price which the subscriber was to pay and the market value at the date of the refusal to pay.³ A fourth and very important remedy is that of forfeiture. It is the subject of this chapter. It is effected in one of two ways: the forfeiture may be by a strict foreclosure of the stockholder's stock—that is, the taking of his stock by the corporation itself; or it may be by a public sale of the stock for non-payment of the subscription.⁴

¹ See § 74, *supra*.

² *Chase v. East Tenn. etc. R. R.*, 5 Lea (Tenn.), 415 (1880).

³ *Rand v. White Mountains R. R.*, 40 N. H. 79 (1860).

⁴ Quoted and approved in *Thomson's Succession*, 46 La. Ann. 1074 (1894).

§§ 122, 123. *The remedy by public sale of stock is by statutory authority only.*—In addition to the remedy of an action at law to compel payment of a subscription for stock, there frequently is given to the corporation the right to sell the subscriber's stock for non-payment of his subscription and apply the proceeds to the payment of that subscription. This is what is generally known as a forfeiture of the stock. It is not a common-law remedy, and, consequently, can be resorted to by the corporation only when power to make the sale is given to the corporation by statute or by the act of incorporation.¹ The right to forfeit may, however, be created by the consent of the stockholders, and be indorsed on the certificates of stock.²

The authority to forfeit shares for non-payment of the subscription cannot be created by a by-law.³ Such a forfeiture would be wholly void, and transfers based thereon would confer no rights upon the transferee.⁴

¹ *Westcott v. Minnesota Min. Co.*, 23 Mich. 145 (1871); *Minnehaha, etc. Assoc. v. Legg*, 50 Minn. 333 (1892); *Budd v. Multnomah St. R'y*, 15 Oreg. 413 (1887). In the last case the statute gave the corporation power to make by-laws for forfeiture of stock. There being no by-law, a forfeiture was attempted by a resolution of the board of directors. *Held*, this could not be done. *Barton's Case*, 4 De G. & J. 46 (1859), is similar and stronger, as public notices and advertisements were made of the threatened forfeiture. *Perrin v. Granger*, 30 Vt. 595 (1858); *Clarke v. Hart*, 6 H. L. Cas. 633 (1858); *Stanhope's Case*, L. R. 1 Ch. App. 161 (1865). In *Kelk's Case*, L. R. 9 Eq. 107 (1869), the forfeiture was provided for in deed of settlement, and hence regular. If the corporation purchases at forfeiture sale, as it may by statute in California, execution against the corporation cannot be levied on such stock. *Robinson v. Spaulding, etc. Co.*, 72 Cal. 32 (1887). A building association cannot provide that it will discount a subscriber's stock, loan him the amount thus discounted, and forfeit

the whole if he does not pay. It is usury. *Henderson, etc. Assoc. v. Johnson*, 88 Ky. 191 (1889).

² *Weeks v. Silver Islet, etc. Co.*, 55 N. Y. Super. Ct. 1 (1887).

³ *Re Long Island R. R.*, 19 Wend. 37 (1837); S. C., 32 Am. Dec. 429; *Kirk v. Nowill*, 1 T. R. 118 (1786). *Cf. Kennebec, etc. R. R. v. Kendall*, 31 Me. 470 (1850); *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495, 506 (1868).

⁴ *Re Long Island R. R.*, 19 Wend. 37 (1837). Yet, where such a power was conferred by a by-law adopted at a meeting of the stockholders, a stockholder whose stock has been declared forfeited under the by-law, and who is shown to have assented to the by-law, will not be heard to question the validity of the forfeiture. He is estopped. *Lesseps v. Architects' Co.*, 4 La. Ann. 316 (1849). The corporation cannot, by a by-law, forfeit shares temporarily, until penalties or fines shall have been paid. *Adley v. Reeves*, 2 Maule & S. 53 (1813), by Lord Ellenborough. *Cf. Cartan v. Father Matthew, etc. Soc.*, 3 Daly (N. Y.), 20 (1869); *Pentz v. Citizens', etc. Co.*, 35 Md. 73 (1871). But only the stockholder can

§ 124. *The remedy by forfeiture is cumulative.*—Frequently, when a corporation is authorized by statute to forfeit shares for non-payment of the subscription, the question arises whether the statutory remedy of forfeiture is exclusive, thereby preventing a resort to the common-law remedy of an action of *assumpsit* on the contract. It is the well-established rule that it does not. A grant of the power to declare a forfeiture of the shares of a subscriber for non-payment of calls does not, by implication, deprive the corporation of its option of remedies; and the corporation may, in its discretion, upon the failure of the subscriber to pay for his stock, either proceed against him by suit to collect the unpaid calls, or may forfeit his shares of stock. The corporation, by such a statute, is given its choice of remedies, and may pursue either. The remedy by forfeiture is additional. In legal language the remedy by forfeiture is cumulative.¹

object to a forfeiture on the ground that it is by by-law. *Detweiler v. Breckenkamp*, 83 Mo. 45 (1884). Cf. §§ 131, 134, *infra*. As to the effect of acquiescence or waiver by the stockholder, see §§ 129, 134, *infra*.

¹*San Joaquin, etc. Co. v. Beecher*, 101 Cal. 70 (1894); *Denver Chamber, etc. v. Green*, 8 Colo. App. 420 (1896); *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466 (1893); *Puget Sound, etc. R. R. v. Ouellette*, 7 Wash. 265 (1893); *Delaware, etc. Canal v. Sansom*, 1 Binn. (Pa.) 70 (1803); *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.), 576 (1812); *Rensselaer, etc. Co. v. Barton*, 16 N. Y. 457, note (1854); *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857); *Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336 (1856); *Tutwiler v. Tuscaloosa, etc. Co.*, 89 Ala. 391 (1890); *Harlaem Canal Co. v. Seixas*, 2 Hall (N. Y. Super. Ct.), 504 (1829); *Fort Edward, etc. Co. v. Paine*, 17 Barb. 567 (1854); *Rensselaer, etc. Co. v. Wetsel*, 21 Barb. 56 (1855); *Sagory v. Dubois*, 3 Sandf. Ch. 466 (1846); *Troy, etc. R. R. v. McChesney*, 21 Wend. 296 (1839); *Herkimer Mfg. Co. v. Small*, 21 Wend. 273 (1839); *Ogdensburgh, etc. R. R. v.*

Frost, 21 Barb. 541 (1856); *Northern R. R. v. Miller*, 10 Barb. 260 (1851); *Troy, etc. R. R. v. Tibbits*, 18 Barb. 297 (1854); *Troy, etc. R. R. v. Kerr*, 17 Barb. 581 (1854); *Jenkins v. Union Turnp. Co.*, 1 Caines' Cas. 86, 95 (1804); *Goshen, etc. Co. v. Hurtin*, 9 Johns. 217 (1812); *McDonough v. Phelps*, 15 How. Pr. 372 (1856); *Freeman v. Winchester*, 18 Miss. 577 (1848); *Hartford, etc. R. R. v. Kennedy*, 12 Conn. 499 (1838); *Mann v. Cooke*, 20 Conn. 178 (1850); *Connecticut, etc. R. R. v. Bailey*, 24 Vt. 465 (1852); *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *New Hampshire, etc. R. R. v. Johnson*, 30 N. H. 390 (1855); *White Mountains R. R. v. Eastman*, 34 N. H. 124, 147 (1856); *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491 (1859); *Hightower v. Thornton*, 8 Ga. 486, 502 (1850); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Beene v. Cahawba, etc. R. R.*, 3 Ala. (N. S.) 660 (1842); *Selma, etc. R. R. v. Tipton*, 5 Ala. (N. S.) 787 (1843); *Gratz v. Redd*, 4 B. Mon. (Ky.) 178 (1843); *Boston, etc. R. R. v. Wellington*, 113 Mass. 79 (1873). [Compare with this case *Worcester Turnp. Corp. v. Willard*, 5 Mass. 80 (1809);

It is to be borne in mind, however, that in the New England states the right to forfeit stock for non-payment of assessments does not imply a right in the corporation to sue for such assessments. The latter right does not exist at all unless it is given by statute or by the express promise of the subscriber.¹ But where both remedies exist, the corporation has its election which remedy to pursue.²

§§ 125, 126. *Forfeiture relieves the shareholder whose shares are forfeited from liability to the corporation.*—Although a corporation having the right to declare a forfeiture of shares for non-payment of calls may generally, at its option, either forfeit the stock or bring an action to collect the amount due, it does not follow that it can forfeit the stock and then bring an action for the unpaid calls, or any part thereof that may remain unsatisfied by the forfeiture. The corporation, when a shareholder is in default, may pursue either the one remedy or the other in its discretion; but it cannot forfeit the stock and afterwards sue at law. The first remedy excludes the second.³

Andover, etc. Co. v. Gould, 6 Mass. 39 (1809); New Bedford, etc. Corp. v. Adams, 8 Mass. 138 (1811); City Hotel v. Dickinson, 72 Mass. 586 (1856); Mechanics', etc. Co. v. Hall, 121 Mass. 272 (1876).] Mexican Gulf Ry. v. Vivant, 6 Rob. (La.) 305 (1843); New Orleans, etc. Co. v. Briggs, 27 La. Ann. 318 (1875); Greenville, etc. R. R. v. Cathcart, 4 Rich. L. (S. C.) 89 (1850); Klein v. Alton, etc. R. R., 13 Ill. 514 (1851); Peoria, etc. R. R. v. Elting, 17 Ill. 429 (1856); Kirksey v. Florida, etc. Co., 7 Fla. 23 (1857); Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520 (1825); Stokes v. Lebanon, etc. Co., 6 Humph. (Tenn.) 241 (1845); South Bay, etc. Co. v. Gray, 30 Me. 547 (1849); Franklin Glass Co. v. Alexander, 2 N. H. 380 (1821); S. C., 9 Am. Dec. 92, and note, pp. 96–104. A subscriber for stock cannot avoid liability to the corporation by setting up that the corporation has a lien on the stock therefor and may enforce it. Lankershim, etc. Co. v. Herberger, 82 Cal. 600 (1890). The corporation may sue

for the whole subscription and need not sue merely for the deficiency that would result from selling the stock. International, etc. Assoc. v. Walker, 83 Mich. 386 (1890). For a learned discussion of the general question how far the jurisdiction of a court of equity may be affected by statutes conferring similar jurisdiction upon the courts of law,—an inquiry germane to the matter of the present section,—see note to Payne v. Bullard, 23 Miss. 88 (1851), in 55 Am. Dec. 74, 77.

¹ See § 74, *supra*; also 85 Fed. Rep. 89.

² See §§ 125, 126, *infra*.

³ Small v. Herkimer Mfg. Co., 2 N. Y. 330 (1849), reversing Herkimer Mfg. Co. v. Small, 21 Wend. 273 (1839); S. C., 2 Hill, 127 (1841); Northern R. R. v. Miller, 10 Barb. 260, 271 (1851); Ogdensburgh, etc. R. R. v. Frost, 21 Barb. 541 (1856); Mills v. Stewart, 41 N. Y. 384 (1869); Macaulay v. Robinson, 18 La. Ann. 619 (1866); Allen v. Montgomery R. R., 11 Ala. 437 (1847); Athol, etc. R. R. v. Prescott, 110 Mass.

In order, however, to bar the remedy of an action on the contract, the forfeiture must be complete and actual. Consequently, a mere threat that a forfeiture will be made if the call be not paid on or before a day named, or an unsuccessful attempt to sell the shares, will not be sufficient to bar the action.¹ So long as the stockholder's right to the shares and to the immunities and emoluments attached thereto remain, his obligation to pay is not extinguished.²

There is, however, a line of cases in which a contrary rule is sustained. In these cases it is held that the forfeiture of shares of stock is like the foreclosure of a mortgage; and that, just as a mortgagee may have judgment against the mortgagor for a deficiency, so may a corporation have its action of *assumpsit* against a subscriber whose stock, having been forfeited, has failed to sell for enough to pay his entire indebtedness to the corporation on the subscription.³ This rule is held to apply equally to original subscribers or their transferees; and any

213 (1872); *Mechanics', etc. Co. v. Hall*, 121 Mass. 272 (1876). With these later Massachusetts cases compare *Andover, etc. Co. v. Gould*, 6 Mass. 39 (1809); *Franklin Glass Co. v. White*, 14 Mass. 286 (1817); *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876); *Ashton v. Burbank*, 2 Dill. 435 (1873); *S. C.*, 2 Fed. Cas. 26. Such, also, seems to be the rule in England. *King's Case*, L. R. 2 Ch. 714 (1867); *Knight's Case*, L. R. 2 Ch. 321 (1867); *Snell's Case*, L. R. 5 Ch. 22 (1869). A mere by-law cannot give to the corporation power to collect by suit from the stockholder after a forfeiture of the stock for non-payment has been made. *Mandell v. Swan, etc. Co.*, 154 Ill. 177 (1895). By statute in England the right to forfeit and the right to sue may be exercised together; and shares may be forfeited for non-payment of calls, whether those calls have been sued for or not. *Great Northern R'y v. Kennedy*, 4 Exch. 417 (1849); *Inglis v. Great Northern R'y*, 1 Macq. (Sc. App.) 112 (1852). But there is a line of cases in

England where, by the terms of the deeds of settlement, only an option is given to sue *or* to forfeit, and it is then held that the corporation is concluded by its election. *Inglis v. Great Northern R'y*, *supra*, where, notwithstanding the forfeiture and cancellation of shares and the issue of new ones, the right to recover in an action for calls was held to remain unimpaired in the company. See also *Birmingham, etc. R'y v. Locke*, 1 Q. B. 256 (1841); *Edinburgh, etc. R'y v. Hebblewhite*, 6 M. & W. 707 (1840); *London, etc. R'y v. Fairclough*, 2 Man. & Gr. 674 (1841).

¹ *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876). See also cases cited *supra* and § 131, *infra*.

² *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.), 576, 581 (1812). *Cf. Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336, 347 (1856). It has been held, also, that an action to collect a subscription, when prosecuted to judgment, is a bar to the remedy by forfeiture. *Giles v. Hutt*, 3 Exch. 18 (1848).

³ *Carson v. Arctic Min. Co.*, 5 Mich. 288 (1858); *Danbury, etc. R. R. v. Wil-*

stockholder is liable, under this rule, for the balance due upon assessments, after deducting the amount realized at the forfeiture sale.¹ It has been held that a by-law may render subscribers liable for any deficiency left on the sale of the stock upon non-payment of calls.²

§§ 127, 128. *Forfeiture relieves the shareholder whose shares are forfeited from liability to corporate creditors.*—In the absence of fraud and collusion it is a settled rule that, where a corporation has authority to declare a forfeiture of shares for non-payment of calls, and a forfeiture is regularly declared, such formal declaration puts an end to the liability of the shareholder, and corporate creditors cannot subsequently hold such an expelled or released shareholder liable.³ This is the rule even though the debt was contracted by the company before the stock was forfeited.⁴ The same principle of law that prevents the corporation from suing on a subscription after the

son, 22 Conn. 435 (1853); *Great Northern R'y v. Kennedy*, 4 Exch. 417, 425 (1849).

¹ *Merrimac Min. Co. v. Bagley*, 14 Mich. 501 (1866). Quoted and approved in *Thomson's Succession*, 46 La. Ann. 1074 (1894). *Cf. Hartford, etc. R. R. v. Kennedy*, 12 Conn. 499 (1838); *Brockenbrough v. James River, etc. Co.*, 1 Patton & H. (Va.) 94 (1855); *Mann v. Currie*, 2 Barb. 294 (1848). It is sometimes so provided expressly by statute or by the charter of the company. *Brockenbrough v. James River, etc. Co.*, 1 Patton & H. (Va.) 94 (1855); *Danbury, etc. R. R. v. Wilson*, 22 Conn. 435, 456 (1853); *Great Northern R'y v. Kennedy*, 4 Exch. 417 (1849); *Mann v. Cooke*, 20 Conn. 178 (1850). But see *Athol, etc. R. R. v. Prescott*, 110 Mass. 213 (1872); *Kennebec, etc. R. R. v. Kendall*, 31 Me. 470 (1850); *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847); *Stokes v. Lebanon, etc. Co.*, 6 Humph. (Tenn.) 241 (1845); *Mills v. Stewart*, 41 N. Y. 384 (1869). Or that any shareholder whose shares shall have been forfeited for non-payment of assessments shall nevertheless be liable to

pay to the company all calls owing on such shares at the time of the forfeiture. This seems to be a common provision in the articles of association of English companies. *Creyke's Case*, L. R. 5 Ch. App. 63 (1869); *Stocken's Case*, L. R. 5 Eq. 6 (1867). But in such a case interest is not collectible. *Stocken's Case*, L. R. 5 Eq. 6 (1867). It is otherwise in ordinary defaults. *Gould v. Oneonta*, 71 N. Y. 298 (1877); *Rikhoff v. Brown, etc. Co.*, 68 Ind. 383 (1879).

² *Elizabeth, etc. Mills v. Dunstan*, 121 N. C. 12 (1897); but see 154 Ill. 177.

³ *Allen v. Montgomery R. R.*, 11 Ala. 437, 450 (1847); *Macauly v. Robinson*, 18 La. Ann. 619 (1866); *Mills v. Stewart*, 41 N. Y. 384 (1869); *Woollaston's Case*, 4 De G. & J. 437 (1859); *Ex parte Beresford*, 2 Macn. & G. 197 (1850); *Kelk's Case*, L. R. 9 Eq. 107 (1869); *Dawes's Case*, L. R. 6 Eq. 232 (1868); *Snell's Case*, L. R. 5 Ch. App. 22 (1869). Nor, on the other hand, can the stockholder claim, after the forfeiture, any of the rights of stockholdership. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 116 Ill. 170 (1886).

⁴ *Mills v. Stewart*, 41 N. Y. 384 (1869).

stock has been forfeited prevents the corporate creditors also from doing the same. But, on the other hand, inasmuch as fraud vitiates all acts into which it enters, a forfeiture of shares by collusion between a shareholder and the board of directors of the corporation will not release him from liability to contribute in the event of the insolvency of the company.¹ In such a case the creditors may invoke the interposition of a court of equity to prevent the consummation of an inchoate forfeiture, or to set aside one already accomplished.² Hence, it is well settled that the power of forfeiture cannot lawfully be exercised for the purpose of enabling members to escape from their liability on their stock, either to the corporation or its creditors.³ A stockholder, by mere abandonment of his shares, cannot forfeit them himself, and thus, by his own act, discharge himself from his obligation on the subscription.⁴

¹ *Slee v. Bloom*, 19 Johns. 456 (1822); *Mills v. Stewart*, 41 N. Y. 384 (1869); *Walter's Second Case*, 3 De G. & Sm. 244 (1850); *Richmond's Case*, 4 K. & J. 305 (1858); *Spackman's Case*, 11 Jur. (N. S.) 207 (1865); *Stanhope's Case*, L. R. 1 Ch. App. 161 (1866); *Stewart's Case*, L. R. 1 Ch. App. 511 (1866); *Gower's Case*, L. R. 6 Eq. 77 (1868).

² *Germantown, etc. R'y v. Fitler*, 60 Pa. St. 124 (1869). See also *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557 (1884). The fact that the corporation might have forfeited the stock, but in fact did not, is no defense as against the corporate creditors. If a transaction between a shareholder and the directors is irregular, but is alleged to have been acquiesced in, it is incumbent upon the stockholder to support such allegation by showing that the transaction was fully made known to the general body of the shareholders. *Spackman's Case*, 11 Jur. (N. S.) 207 (1865). A stockholder whose stock is forfeited in a building association for non-payment of dues, as authorized by the charter, cannot recover back the money paid by him. *Freeman v. Ottawa, etc. Assoc.*, 114 Ill. 182 (1885).

³ *Spackman v. Evans*, L. R. 3 H. L. 171 (1868); *Stanhope's Case*, L. R. 1 Ch. App. 161 (1866); *Richmond's Case*, 4 Kay & J. 305 (1858); *Manisty's Case*, 17 Sol. Jour. 745 (1873); *Gower's Case*, L. R. 6 Eq. 77 (1868); *Ex parte Jones*, 27 L. J. Ch. 666 (1858); *Hall's Case*, L. R. 5 Ch. App. 707 (1870); *Mills v. Stewart*, 41 N. Y. 384 (1869). *Cf. Dixon v. Evans*, L. R. 5 H. L. 606 (1872); *Belhaven's Case*, 11 Jur. (N. S.) 572 (1865); *S. C.*, 12 L. T. (N. S.) 595 (1865); *Clarke v. Hart*, 6 H. L. Cas. 633 (1858); *Garden Gully, etc. Co. v. McLister*, L. R. 1 App. Cas. 39 (1875); *Sweny v. Smith*, L. R. 7 Eq. 324 (1869); *Chouteau v. Dean*, 7 Mo. App. 211 (1879). *Cf. Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864).

⁴ *Rockville, etc. Turnp. Co. v. Maxwell*, 2 Cranch, C. C. 451 (1824); *S. C.*, 20 Fed. Cas. 1079. For sundry illustrations of what will or will not justify a forfeiture, see, particularly, *Sweny v. Smith*, L. R. 7 Eq. 324 (1869); *Stocken's Case*, L. R. 3 Ch. App. 412 (1867); *Kelk's Case*, L. R. 9 Eq. 107 (1869); *Thomas's Case*, L. R. 13 Eq. 437 (1872). It is no defense that defendant supposed he could pay balance of subscription or have a for-

§ 129. *Statutory formalities and general method of forfeiture.*—The general method of forfeiting shares for non-payment of calls is usually prescribed in detail by the statute authorizing the forfeiture. In the earlier cases there may be observed some tendency to hold that a substantial, in distinction from a strict, compliance with the requirements of the statute is all that is necessary to a valid forfeiture.¹ But in later cases, English² and American,³ it is plainly declared, and it may be taken as a settled rule, that the validity of the forfeiture and sale of the shares of a subscriber in arrears depends upon a strict and formal compliance with the requirements of the enabling statute.⁴

Thus, a sale of the shares at private sale, when a sale by public auction was prescribed, has been held to invalidate the forfeiture.⁵ There must be a properly constituted board of direct-

feiture of stock. *Ross v. Bank of Gold Hill*, 20 Nev. 191 (1888).

¹ *Catchpole v. Ambergate, etc. R'y*, 1 El. & B. 111 (1852); *Nolan v. Annabella Gold Min. Co.*, 6 Wyatt, W. & A'B. (Australian Cts. of Mines), 38 (1869). Cf. *Woollaston's Case*, 4 De G. & J. 437 (1859); *Knight's Case*, L. R. 2 Ch. App. 321 (1867).

² *Clarke v. Hart*, 6 H. L. Cas. 633 (1858); *Johnson v. Lyttle's Iron Agency*, 46 L.J. (Ch.) 786 (1877). Cf. *Knight's Case*, L. R. 2 Ch. App. 321 (1867); *Garden Gully, etc. Co. v. McLister*, L. R. 1 App. Cas. 39 (1875); *London, etc. R'y v. Fairclough*, 2 Man. & G. 674 (1841). In England a forfeiture may be made after a call, and before the call is due. The call is "owing" from the time when it is made. *Faure, etc. Co. v. Phillipart*, 58 L. T. Rep. 525 (1888), where the forfeiture was made on two calls, one past due and one not yet due.

³ *Portland, etc. R. R. v. Graham*, 52 Mass. 1 (Shaw, C. J., 1846); *German-town, etc. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Eastern Plank-road v. Vaughan*, 20 Barb. 155 (1855); *York, etc. R. R. v. Ritchie*, 40 Me. 425 (1855); *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860); *Downing v. Potts*, 23 N. J. L. 66 (1851); *Re Long Island*

R. R., 19 Wend. 37 (1837); *Mitchell v. Vermont Copper Min. Co.*, 40 N. Y. Super. Ct. 406 (1876); *Occidental, etc. Assoc. v. Sullivan*, 62 Cal. 394 (1882). Cf. *Johnson v. Albany, etc. R. R.*, 40 How. Pr. 193 (1870); *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *Perrin v. Granger*, 30 Vt. 595 (1858). In forfeiting stock every condition precedent must be strictly and literally complied with. Where an irregular forfeiture is made in 1878, and is discovered by the stockholder in 1885, he need not take active remedies, but may wait and claim a share in the assets upon distribution. Where notice of calls must be published in two cities before forfeiture, publication in one city only is insufficient. *Morris v. Metalline Land Co.*, 164 Pa. St. 326 (1894). A corporation cannot sell stock for failure to pay calls where the by-laws do not provide the mode of sale, and where the statute authorizing such sale prescribes that it shall be in accordance with the by-laws. *Clise Inv. Co. v. Washington Sav. Bank*, 50 Pac. Rep. 575 (Wash., 1897).

⁴ *Garden Gully, etc. Co. v. McLister*, L. R. 1 App. Cas. 39 (1875); *German-town, etc. R'y v. Fitler*, 60 Pa. St. 124 (1869).

⁵ *Lewey's Island R. R. v. Bolton*,

ors to declare a forfeiture of shares.¹ It is held, in general, that, in the absence of statutory provisions as to order or details, the mode of forfeiture must be reasonable and just.² The forfeiture may be regularly effected by a resolution of the board of directors, ordering a sale of all stock on which assessments shall remain unpaid at a day named in the future.³

After forfeiting the stock the company cannot disregard the forfeiture and hold the stockholder liable as a stockholder on the ground that its proceedings were irregular.⁴ It is a well-

48 Me. 451 (1860). As to what is, in general, sufficient to satisfy the requirements of the rule that powers of forfeiture are to be construed strictly and exercised or pursued strictly, see *Giles v. Hutt*, 3 Exch. 18 (1848); *Catchpole v. Ambergate, etc. R'y*, 1 El. & B. 111 (1852); *Birmingham, etc. R'y v. Locke*, 1 Q. B. 256 (1841); *Graham v. Van Diemen's Land Co.*, 1 Hurl. & N. 541 (1856); *Sweny v. Smith*, L. R. 7 Eq. 324 (1869); *Stocken's Case*, L. R. 3 Ch. App. 412 (1867); *Kelk's Case*, L. R. 9 Eq. 107 (1869); *Thomas's Case*, L. R. 13 Eq. 437 (1872); *Gower's Case*, L. R. 6 Eq. 77 (1868). It has, however, been held in an English case—*Knight's Case*, L. R. 2 Ch. App. 321 (1867)—that, when it is a matter of mere form rather than of substance that has not been strictly followed in proceedings to forfeit shares, the forfeiture will not necessarily be thereby invalidated.

¹*Garden Gully, etc. Co. v. McLister*, L. R. 1 App. Cas. 39, 55 (1875). A stockholder may enjoin a forfeiture on the ground that the directors were illegally elected. *Moses v. Tompkins*, 84 Ala. 613 (1888).

²*Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863); *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280 (1876).

³*Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863). See also *Woollaston's Case*, 4 De G. & J. 437 (1859). Under such a resolution a sale of the stock is not necessary to complete the forfeiture, where the effect of the for-

feiture is to release the stockholder from any future liability, and where he is not entitled to the surplus, if any there be, after sale. *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863). It is, however, said elsewhere that a general resolution, not specifying the stock which is forfeited, but merely assuming to forfeit any and all stock whose owners are in arrears, does not effect a valid forfeiture. *Johnson v. Albany, etc. R. R.*, 40 How. Pr. 193 (1870). When, after default made in the payment of assessments, notice is given by the corporation that the shares of owners in arrears will be forfeited unless full payment of what is due be made by a day named, there is a presumption that the subsequent proceedings of the company looking to perfecting the forfeiture are valid and regular. *Knight's Case*, L. R. 2 Ch. App. 321 (1867), holding that where, by the articles of association, provision is made for forfeiture by resolution with notice upon default, the court will assume that the requisite steps have been taken to make a valid forfeiture, even though it does not appear that such resolution was passed or that notice was sent. The notice is a notice that the forfeiture has already been declared, not that it will be made on further default. That notice is a condition precedent.

⁴*Patterson v. Brown, etc. Co.*, 3 Colo. App. 511 (1893).

established rule, also, that a forfeiture of shares, where the forfeiture was irregular or defective in its form, is not void, but voidable, and that, by subsequent knowledge and acquiescence, the shareholder and the company are alike estopped to deny its validity.¹ Under the California code a corporation may by suit foreclose a lien which it has on its stock.²

¹ King's Case, L. R. 2 Ch. App. 714, 731 (1867); Woollaston's Case, 4 De G. & J. 437 (1859); Webster's Case, 32 L. J. (Ch.) 135 (1862); Knight's Case, L. R. 2 Ch. App. 321 (1867); Kelk's Case, L. R. 9 Eq. 107 (1869); Austin's Case, 24 L. T. (N. S.) 932 (1871); Prendergast v. Turton, 1 Y. & C. (Ch.) 98 (1841). Cf. Lyster's Case, L. R. 4 Eq. 233 (1867); Teasdale's Case, L. R. 9 Ch. App. 54 (1873); Phosphate, etc. Co. v. Green, L. R. 7 C. P. 43 (1871). Here the company had power to forfeit shares for non-payment and to compromise debts, but were prohibited from purchasing their own shares. The transaction in issue was held to be such a purchase, and hence *ultra vires*, but the members were estopped by knowledge and acquiescence. In this case it was also said that, to show assent and acquiescence in such a case, it is not necessary or possible to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry. Houldsworth v. Evans, L. R. 3 H. L. 263 (1868); Spackman v. Evans, L. R. 3 H. L. 171 (1868). Here the terms of the withdrawal were not in accordance with the deed of settlement, and it was held after years that the party was still liable as a contributor. In Evans v. Smallcombe, L. R. 3 H. L. 249 (1868), a member withdrawing under a like arrangement was held not liable on

the double ground of lapse of time and a clear presumption of knowledge and acquiescence. In Houldsworth v. Evans, L. R. 3 H. L. 263 (1868), an irregularity in the condition of withdrawal was held substantial and the transaction *ultra vires*. (One lord dissented, on the ground that years of acquiescence retrospectively sanctioned it.) In Brotherhood's Case, 31 Beav. 365 (1862), dissentient members were allowed to withdraw, by resolution, upon terms which were certainly *ultra vires*. The master of the rolls said that the transaction might have been set aside at the time; but all parties having had full knowledge, and having acquiesced for more than twelve years, the court would not, after such a lapse of time, touch the transaction. In Lesseps v. Architects' Co., 4 La. Ann. 316 (1849), the court regarded a general acquiescence in a by-law for a forfeiture, itself *ultra vires*, as a matter of contract, and refused equitable relief. Cf. Lindley on Companies, p. 533, where the author says: "If there is power to forfeit, and the shares intended to be forfeited are treated by the company and the shareholders as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place." Garden Gully, etc. Co. v. McLister, L. R. 1 App. Cas. 39, 55 (1875), holding that mere laches does not, of itself, disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture.

² Mechanics', etc. Assoc. v. King, 83 Cal. 440 (1890). Where the statute

§ 130. *Notice in cases of forfeiture.*—A notice to the delinquent subscriber that his shares will be forfeited at a day named is generally requisite to effect a forfeiture. The subscriber is entitled to full knowledge of the fact that, unless he pays up within a specified time, he will lose his stock. The requirements of the statute or charter, with respect to the contents of the notice, and the length of time which is to elapse between the notice and the forfeiture, must all be strictly complied with.¹ It is accordingly held that the notice must state correctly the amount due for non-payment of which the stock is to be forfeited.² The time, also, within which payment is to be made must be accurately stated,³ and also the place where the sale is

authorizes a suit after publication of the intent to forfeit by sale, such suit cannot be brought before such publication. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. *Tulare, etc. Dist. v. Kaweah, etc. Co.*, 44 Pac. Rep. 662 (Cal., 1896).

¹ *Heaston v. Cincinnati, etc. R. R.*, 16 Ind. 275 (1861); *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860); *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536, 546 (1863); *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857); *Sands v. Sanders*, 26 N. Y. 239 (1863); *Mississippi, etc. R. R. v. Gaster*, 20 Ark. 455 (1859); *Hughes v. Antietam, etc. Co.*, 34 Md. 317 (1870); *Johnson v. Lyttle's Iron Agency*, 46 L. J. (Ch.) 786 (1877); *Cockerell v. Van Diemen's Land Co.*, 26 L. J. (C. P.) 203 (1857); *Watson v. Eales*, 23 Beav. 294 (1856). Cf. *Eppes v. Mississippi, etc. R. R.*, 35 Ala. 33 (1859); *Schenectady, etc. Co. v. Thatcher*, 11 N. Y. 102 (1854); *Harlæm Canal Co. v. Seixas*, 2 Hall (N. Y.), 504 (1829); *Mitchell v. Vermont Min. Co.*, 40 N. Y. Super. Ct. 406 (1876); *New Albany, etc. R. R. v. McCormick*,

10 Ind. 499 (1858). Cf. *Lexington, etc. R. R. v. Chandler*, 54 Mass. 311 (1847), where notice, provided for by a by-law, was held not a condition precedent, but only directory, and substantial compliance was sufficient. *Knight's Case*, L. R. 2 Ch. App. 321 (1867), is sometimes wrongly cited, for the reason that there are two notices provided for: (1) notice that forfeiture will be made on default at future time, and (2) notice after forfeiture that it has been made. The former is essential, the latter not.

² So where the notice stated that unless the amount of a certain call, together with lawful interest from the date of the call, was paid on or before a certain day, the shares would be liable to forfeiture, it was held that, as interest was only payable from the day fixed for payment, and not from the date of the call, the notice was irregular, and that a forfeiture founded on a non-compliance with such a notice was bad. *Johnson v. Lyttle's Iron Agency*, 46 L. J. (Ch.) 786 (1877).

³ A notice that the stock will be forfeited "on Monday, the 9th," when in point of fact the 9th comes on Friday, is not a sufficient notice. *Watson v. Eales*, 23 Beav. 294 (1856).

to be made.¹ The mode of giving notice of a contemplated forfeiture of stock is generally specified in the statute authorizing the forfeiture.²

§ 131. *Notice is not the same thing as forfeiture.*—A notice of a probable or certain forfeiture in the future, or a threat of forfeiture, is not forfeiture, and does not become forfeiture merely by non-payment of the call or assessment within the time specified in the notice.³ A forfeiture is void if declared

¹ Accordingly, a notice in all other respects regular, which does not state the place of sale, is insufficient, although it names the day of sale, and the auctioneer, who was and had long been an auctioneer in the place at which the notice was dated. *Lexington, etc. R. R. v. Staples*, 71 Mass. 520 (1855). In the absence of a statutory provision as to time, it is said that three days' notice of the time and place of the sale of shares for non-payment of assessments is too short and unreasonable, where the owner of the shares lives at a distance in another state. *Lexington, etc. R. R. v. Staples*, 71 Mass. 520 (1855). In *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863), a thirty days' notice is said to be sufficient and reasonable. And where the charter provided that notice of an assessment should be given to the subscriber thirty days before the order of the directors to sell the shares, a notice thirty days before the sale was held insufficient. *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860); *Louisville, etc. Co. v. Meriwether*, 5 B. Mon. (Ky.) 13 (1844). A printed notice in designated newspapers, published in cities where the subscribers reside, is good notice of a call. *Louisville, etc. Turnp. Co. v. Meriwether*, 5 B. Mon. 13 (1844).

² In *Mississippi, etc. R. R. v. Gaster*, 20 Ark. 455 (1859), it is said that the mode of giving a notice in these cases is directory rather than mandatory, and that, where the charter provided

that notice be given in certain newspapers, a personal notice would be sufficient. See also *Knight's Case*, L. R. 2 Ch. App. 321 (1867). So 'where a by-law provided for notice by letter, it was held that personal notice sufficed. *Lexington, etc. R. R. v. Chandler*, 54 Mass. 311 (1847). But see *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860). In general, as to the effect of a notice left at one's residence or place of business, but which never reaches the person for whom it is intended, see *Cockerell v. Van Diemen's Land Co.*, 26 L. J. (C. P.) 203 (1857); *S. C. aff'd, sub nom. Van Diemen's Land Co. v. Cockerell*, 1 C. B. (N. S.) 732. *Cf. Birmingham, etc. R'y v. Locke*, 1 Q. B. 256 (1841); *Graham v. Van Diemen's Land Co.*, 1 Hurl. & N. 541 (1856). See also *South Staffordshire R'y v. Burnside*, 5 Exch. 129 (1850), and § 119.

³ *Macon, etc. R. R. v. Vason*, 57 Ga. 314 (1876); *Bigg's Case*, L. R. 1 Eq. 309 (1865); *Cockerell v. Van Diemen's Land Co.*, 26 L. J. (C. P.) 203 (1857); *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655 (1876), where only a threat was made. *Cf. § 125, supra*. But see *Knight's Case*, L. R. 2 Ch. App. 321 (1867). In *Knight's Case* it was further provided that the declaration of forfeiture should be at once entered in the register. Entry was duly made of the date of the forfeiture, but not of the declaration itself. All essentials being regular, and there being no strict requirement of a written resolution, the court held the

for the non-payment of assessments, when all or any one of the assessments were illegal or unauthorized.¹

§ 132. *Tender, by stockholder, before forfeiture.*—Where the amount due on a subscription for non-payment of which a forfeiture is about to take place is tendered to the proper officer of the corporation at any time before the sale actually takes place,² the forfeiture is not valid. This rule is based in justice, and, while protecting the corporation and the public, it relieves the stockholder from the hardship of a harsh and summary remedy.

§ 133. *Surplus, after valid forfeiture, belongs to the corporation — Purchase by the corporation.*—Upon a sale of the stock forfeited, if the amount realized is more than the debt due the corporation, the surplus belongs to the corporation.³ The pur-

forfeiture valid because the entry of forfeiture could not have been properly made without a resolution of the directors, which would hence be assumed. In *Austin's Case*, 24 L. T. (N. S.) 932 (1871), it is said that a corporation, after forfeiting shares, cannot set the forfeiture aside, and hold the owner liable as a subscriber, on the ground that the notice given him was irregular. It is for the subscriber alone to raise that objection to the validity of the forfeiture. Cf. § 123, *supra*; *Birmingham, etc. R'y v. Locke*, 1 Q. B. 256 (1841). A mere declaration of forfeiture is not sufficient to effect it, and is no bar to an action on the subscription. *Minnehaha, etc. Assoc. v. Legg*, 50 Minn. 333 (1892). A resolution of forfeiture does not constitute forfeiture, and is no bar to an action. *Hays v. Franklin, etc. Co.*, 35 Neb. 511 (1892).

¹*Stoneham Branch R. R. v. Gould*, 68 Mass. 277 (1854); *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860).

²*Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280 (1876); *Sweny v. Smith*, L. R. 7 Eq. 324 (1869). In *Sweny v. Smith* a bill was filed to annul the forfeiture, which was made because the tender (although in time

and place) was accompanied by a protest. *Held*, the protest did not vitiate the tender. *Walker v. Ogden*, 1 Biss. 287 (1859); S. C., 29 Fed. Cas. 41, where the articles of a private joint-stock company provided for a forfeiture, but in no express mode, and a forfeiture was declared of certain shares which thereafter remained undistributed. No rights of third parties were vested in consequence; and the court of equity, never favoring forfeitures, decreed that upon payment of the whole amount due, principal and interest, the complainant should be allowed to redeem his stock. The court did not *rule*, but was "inclined to the opinion," that "the mere declaration of the trustees" could not "have the effect to foreclose all Walker's interest," and "that a judicial decree of foreclosure upon a bill filed by the trustee was necessary in order to bar his right to redeem his stock."

³*Small v. Herkimer Mfg. Co.*, 2 N. Y. 330 (1849); *Great Northern R'y v. Kennedy*, 4 Exch. 417, 426 (1849), by Rolfe, B. (ruling on the language of a special act): "It is clear that the declaration of forfeiture is in the nature of a mortgage. The company

chaser at the forfeiture sale, if the stock has been only partially paid for, must pay the instalments due and to come due, and if he fail to make these payments the stock must be sold again.¹ It seems, however, that if the corporation purchases the stock itself, it may resell the stock at any price it pleases.² Even though the charter of an irrigation company provides that no one shall hold stock except an owner of land to the amount of one acre for each share of stock held by him, yet where the stock is sold for non-payment of assessments the purchaser at such sale is entitled to a transfer on the corporate books although he owns no land. The purchaser may file a bill in equity to determine his rights.³

§ 134. *Equity will relieve a shareholder from an unauthorized forfeiture—Action at law for damages.*—The share-owner himself, as well as a corporate creditor, may, in a proper case, invoke the aid of a court of chancery when his shares have been forfeited in an unauthorized or unlawful manner. Usually, in such a case, the shareholder may, by bill in equity, obtain a decree annulling the forfeiture.⁴ Where an illegal assessment has

are not to sell more of the shares than will be sufficient, as nearly as can be ascertained, to pay the arrears of calls, together with interest and expenses; and if there be any surplus, it is to be paid to the defaulter, who has a right to redeem at the last moment before sale. That shows that the forfeited shares are a security only until payment." Cf. *Freeman v. Harwood*, 49 Me. 195, 198 (1859), *dictum*, and 86 Fed. Rep. 863.

¹ *Sturges v. Stetson*, 1 Biss. 246, 251 (1858); S. C., 23 Fed. Cas. 311.

² See § 29, *supra*.

³ The court found it unnecessary to pass on the question as to whether such a restriction as to the stock is legal. *Spurgeon v. Santa Ana, etc. Co.*, 52 Pac. Rep. 140 (Cal., 1898).

⁴ *Sweny v. Smith*, L. R. 7 Eq. 324 (1869); *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280 (1876); *Adley v. Whitstable Co.*, 17 Ves. 315 (1810, by Lord Eldon); *Sloman v. Bank of England*, 14 Sim. 475 (1845); *Norman*

v. Mitchell, 5 De G., M. & G. 648 (1854). Thus, a forfeiture of shares for non-payment of calls, declared at a meeting held out of the state in which the company was incorporated, the meeting being in consequence an unlawful meeting, may be set aside upon a proper application to a court of chancery at any time within the period prescribed by the statute of limitations for bringing an action for conversion. *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623 (1874). An injunction will not be granted to restrain the sale of stock for non-payment of assessments, though notice thereof was illegal, where the plaintiff does not offer to pay the calls. *Burham v. San Francisco, etc. Co.*, 76 Cal. 26 (1888). See also *Burham v. San Francisco, etc. Co.*, 76 Cal. 24 (1888). Forfeiture may be enjoined. *Moore v. New Jersey Lighterage Co.*, 5 N. Y. Supp. 192 (1889). The forfeiture will not be set aside if the organization

been made, and the stock is about to be sold, a stockholder may enjoin the sale and cause the assessment to be set aside.¹ A stockholder may obtain an injunction against the forfeiture where the books of the company are in confusion and the stockholder makes out a *prima facie* case that the company owes him more than the amount due on his subscription.²

So, also, equity will sometimes set aside a forfeiture upon purely equitable grounds; as, for example, where a forfeiture was declared for non-payment of calls, which, it was shown, were not paid because the shareholder had died, and no administrator had been appointed before the time for payment had fully elapsed.³ A corporation cannot single out the stock of one stockholder and proceed to sell it for non-payment of assessments, where other stockholders are also in arrears.⁴ But it seems that the weight of authority is to the effect that a forfeiture of shares, lawful and regular, for non-payment of assessments, is one of those forfeitures from which equity will not afford relief except in very exceptional cases.⁵ When the shareholder has lost his shares by an irregular or unlawful forfeiture, his suit should be for the recovery of his shares, and not for an undivided interest in the property of the company.⁶ Acquies-

meeting of the company was illegal, having been held out of the state. *Smith v. Silver Valley Min. Co.*, 64 Md. 85 (1885).

¹ *Green v. Abietine Medical Co.*, 96 Cal. 322 (1892).

² *Schuetz v. German, etc. Co.*, 21 N. Y. App. Div. 163 (1897).

³ *Glass v. Hope*, 16 Grant (Up. Can. Ch.), 420 (1869). Cf. *Walker v. Ogden*, 1 Biss. 287 (1859); S. C., 29 Fed. Cas. 41.

⁴ *Hardee v. Sunset Oil Co.*, 56 Fed Rep. 51 (1893).

⁵ *Sparks v. Liverpool Water-works*, 13 Ves. 428 (1807); *Prendergast v. Turton*, 1 Y. & C. (Ch.) 98 (1841); *German-town, etc. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Clark v. Barnard*, 108 U. S. 436, 456 (1882). Equity will not relieve where, on the reorganization of a company, old stockholders fail to use their options for securing new shares before the expiration of a fixed time

limit. *Vatable v. New York, etc. R. R.*, 96 N. Y. 49, 57 (1884). Equity will not relieve from such forfeiture, because to do so would, it is said, be in contravention of the direct expression of the legislative will. *Small v. Herkimer Mfg. Co.*, 2 N. Y. 330, 340 (1849). Neither can a share-owner have a forfeiture set aside merely because the calls which he refused to pay were for the purpose of paying debts which the company would not have owed but for the previous misappropriation of the corporate funds by the trustees. *Marshall v. Golden Fleece, etc. Co.*, 16 Nev. 156, 179 (1881); *Weeks v. Silver Islet, etc. Co.*, 55 N. Y. Super. Ct. 1 (1887); *Taylor v. North Star, etc. Co.*, 79 Cal. 285 (1889).

⁶ *Smith v. Maine Boys Tunnel Co.*, 18 Cal. 111 (1861). The suit to set aside the forfeiture must be brought in the state where the corporation is

cence or delay, as we have seen, on the part of the shareholder, will usually bar his right in a court of equity to have the forfeiture set aside.¹ If the forfeiture is irregular the party deprived of his stock may collect damages.²

incorporated. *North State, etc. Co. v. Field*, 64 Md. 151 (1885); *Sudlow v. Dutch Rhenish R'y*, 21 Beav. 43 (1855). See *Wilkins v. Thorne*, 60 Md. 253 (1883). The courts of Maryland will not issue a *mandamus* to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. *North State, etc. Co. v. Field*, 64 Md. 151 (1885).

¹See § 129, *supra*. It will, moreover, sometimes be found that a general statute, or the charter of the corporation, fixes or limits the time within which a shareholder will be allowed to make such an application to a court of chancery. Thus, in

California, such an application must be made within six months. Civ. Code, § 347.

²*Re New Chile, etc. Co.*, L. R. 45 Ch. D. 598 (1890). A corporation is liable in damages for selling the stock of a stockholder for non-payment of dues where such sale was irregular and illegal, being contrary to the requirements of the by-laws, even though the corporation buys the stock itself at such sale. The fact that a surplus realized at the sale is sent to the stockholder by check and is received by him does not bar his remedy, he being in ignorance of the illegality. *Allen v. American Building, etc. Assoc.*, 49 Minn. 544 (1892).

CHAPTER IX.

DEFENSE OF PAROL AGREEMENTS AND FRAUDULENT REPRESENTATIONS INDUCING SUBSCRIPTIONS FOR STOCK.

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§ 135. *The subject.*—Parol agreements and fraudulent representations inducing subscriptions to stock have been a prolific source of litigation both in this country and in England. As a defense to actions brought for the collection of subscriptions, and as the basis of suits in equity to set aside subscriptions and compel a repayment of money already paid on such subscriptions, the agreements and representations made to induce persons to subscribe for stock have given rise to intricate principles of law peculiar to this subject.

§ 136. *Definitions.*—A parol agreement includes all representations and stipulations made before or at the time of subscribing, but not included in the written subscription, whereby the corporation is to do something or refrain from doing something in the future. A fraudulent representation, on the other hand, is a statement as to past acts or existing facts, or the omission of such a statement, which amount to a fraud on one who, relying thereon, subscribes to the stock of the company.

Difficulty sometimes arises in determining whether a statement by a corporate agent inducing a subscription is merely a parol agreement or is a fraudulent representation. This question is one which must be decided first of all; since the rules of law applicable to parol agreements, as a defense to an action on a subscription, differ greatly from those applicable to fraudulent representations.

§ 137. *Oral agreements and executory contracts.*—Where a subscription contract is absolute on its face, it is well settled, both in equity and at law, that parol evidence of previous or contemporaneous negotiations, stipulations, terms, or agreements is not admissible to vary or add to the contract, except for the purpose of proving that the parties, at the time of consummating the agreement, intended and understood that such terms and stipulations would be incorporated in the contract, but omitted the same by accident, fraud or mistake.¹ This

¹ *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491 (1859); *Kennebec, etc. R. R. v. Waters*, 34 Me. 369 (1852); *Tabor, etc. R'y v. McCormick*, 90 Iowa, 446 (1894); *Nebraska, etc. Assoc. v. Townley*, 46 Neb. 893 (1896); *Cincinnati, etc. R. R. v. Pearce*, 28 Ind. 502 (1867); *Scarlett v. Academy of Music*, 46 Md. 132 (1876); *Dill v. Wabash Valley R. R.*, 21 Ill. 91 (1859); *East Tennessee, etc. R. R. v. Gammon*, 5 Sneed (Tenn.), 567 (1858); *Corwith v. Culver*, 69 Ill. 502 (1873); *Jack v. Naber*, 15 Iowa, 450 (1863); *Thornburgh v. Newcastle, etc. R. R.*, 14 Ind. 499 (1860); *Gelpcke v. Blake*, 15 Iowa, 387 (1863), holding that it is immaterial that the agent acted in good faith; *Johnson v. Pensacola, etc. R. R.*, 9 Fla. 299 (1860); *Mississippi, etc. R. R. v. Cross*, 20 Ark. 443 (1859); *Ridgefield, etc. R. R. v. Brush*, 43 Conn. 86 (1875); *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293 (1875); *aff'd*, 67 N. Y. 294; *Whitehall, etc. R. R. v. Myers*, 16 Abb. Pr. (N. S.) 34 (1872). But see *Brewers' F. Ins. Co. v. Burger*, 10 Hun, 56 (1877), holding that where the original subscription contract is verbal and complete, and a part only of it is after-

wards reduced to writing, it is competent to prove the whole agreement. *Cf. Eighmie v. Taylor*, 98 N. Y. 288 (1885). Parol agreements with the agent who procured the subscription are not admissible. *Philadelphia, etc. R. R. v. Conway*, 177 Pa. St. 364 (1896). An oral condition to a subscription cannot be set up. *Masonic Temple Assoc. v. Channell*, 43 Minn. 353 (1890). An oral statement that the subscriptions would be collected only after connection had been made with a certain place is no defense. *Anderson v. Middle, etc. R. R.*, 91 Tenn. 44 (1891).

In Georgia, under section 3803 of the code, where the subscription does not purport to contain the whole contract, parol evidence is admissible. *Hendrix v. Academy of Music*, 73 Ga. 437 (1884).

In Pennsylvania the case of *McClure v. People's, etc. R'y*, 90 Pa. St. 269 (1879), sustains the general rule, and excludes a parol agreement or condition allowing payment in property. But *Rinesmith v. People's Freight R'y*, 90 Pa. St. 263 (1879); *Caley v. Philadelphia, etc. R. R.*, 80

rule, forbidding the introduction of parol evidence to explain, contradict or vary a written instrument, applies to a subscription contract for stock in a corporation. Neither party is permitted to prove a different contract from that expressed in the written instrument. Under the rule, not even a separate written contemporaneous contract is admissible to change the subscription contract.¹

§ 138. Thus, an oral agreement that a certain location will be adopted,² or that payment may be made in a certain way or

Pa. St. 363 (1876); *Miller v. Hanover*, etc. R. R., 87 Pa. St. 95 (1878); and *McCarty v. Selinsgrove*, etc. R. R., 87 Pa. St. 332 (1878), allow parol evidence to contradict the subscription contract where it is shown that but for the parol agreement the subscription would not have been made; the last two cases saying, however, that the evidence is inadmissible if other stockholders are interested in opposition to such parol agreement. This unusual rule probably has its origin in an old English case (*Pulsford v. Richards*, 17 Beav. 87—1853), which holds that a representation is to be considered *fraudulent* when, if the real truth had been stated, it is reasonable to believe the plaintiff would not have entered into the contract. Thus, a parol agreement that part payment in contract labor should be allowed was held to be void, inasmuch as it varied the terms of a written agreement. *Ridgefield*, etc. R. R. *v. Brush*, 43 Conn. 86 (1875). *Contra*, *Louisville*, etc. R. R. *v. Thompson*, 18 B. Mon. (Ky.) 735 (1857); *McConahy v. Centre*, etc. Co., 1 Pen. & W. (Pa.) 426 (1830), followed in *Swatara R. R. v. Brune*, 6 Gill (Md.), 41 (1847); overruled by *Nippenose Mfg. Co. v. Stadon*, 68 Pa. St. 256 (1871). See also *Weber v. Fickey*, 52 Md. 501 (1879); *Liebke v. Knapp*, 79 Mo. 22 (1888). A parol condition that others were to sign is not admissible. *Minneapolis*, etc. Co. *v. Davis*, 40 Minn. 110 (1889). But it has been held that

a parol agreement herein, made after the subscription, and on a new consideration, is valid. *Pittsburgh*, etc. R. R. *v. Stewart*, 41 Pa. St. 54 (1861). See also *Tonica*, etc. R. R. *v. Stein*, 21 Ill. 96 (1859). *Cf. Bucher v. Dillsburg*, etc. R. R., 76 Pa. St. 306 (1874); *Brewers' F. Ins. Co. v. Burger*, 10 Hun, 56 (1877); *Eighmie v. Taylor*, 98 N. Y. 288 (1885).

The subscriber's remedy is against the person who made the agreement which has not been kept. *Felgate's Case*, 2 De G., J. & S. 456 (1865). An action for damages for breach of contract lies against the corporation if the agreement amounts to a condition subsequent. See ch. V, *supra*.

¹*Brownlee v. Ohio*, etc. R. R., 18 Ind. 68 (1862); *White Mountains R. R. v. Eastman*, 34 N. H. 124 (1856). See also § 191, *infra*. A party sued upon a subscription for stock may show that a letter accompanied the subscription to the effect that he would pay a certain part in cash, which had been done, and pay the balance out of his monthly accounts with the corporation. *Elliott v. New York Endowment Co.*, 73 Hun, 519 (1893).

²*North Carolina R. R. v. Leach*, 4 Jones, L. (N. C.) 340 (1857); *Wight v. Shelby R. R.*, 16 B. Mon. (Ky.) 4 (1855); *Ellison v. Mobile*, etc. R. R., 36 Miss. 572 (1858); *Mississippi*, etc. R. R. *v. Cross*, 20 Ark. 443 (1859); *Evansville*, etc. R. R. *v. Posey*, 12 Ind. 363 (1859); *Eakright v. Logansport*, etc. R. R., 13 Ind. 404 (1859); *Carlisle v. Evansville*,

at a certain time,¹ or that the subscription shall be merely nominal, for the purpose of inducing others to subscribe,² or that the subscription shall be in fact only a pledge of stock by the corporation to the subscriber, or that the stock may be surrendered,³ or that certain property would be purchased by the

etc. R. R., 13 Ind. 477 (1859); *Miller v. Wild Cat, etc. Co.*, 52 Ind. 51 (1875); S. C., 57 Ind. 241 (1877); *Miller v. Hanover, etc. R. R.*, 87 Pa. St. 95 (1878); *Gelpcke v. Blake*, 15 Iowa, 387 (1863); *Braddock v. Philadelphia, etc. R. R.*, 45 N. J. L. 363 (1883); *Killer v. Johnson*, 11 Ind. 337 (1858), holding it immaterial that fraud was actually intended. *Contra*, *Rives v. Montgomery, etc. Co.*, 30 Ala. 92 (1857). Representations of an agent that the road will be built between the termini laid down in the charter are representations relative to the future, and are not fraudulent though not carried out. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890).

¹ *Noble v. Callender*, 20 Ohio St. 199 (1870); *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1848); *Methodist E. Church v. Town*, 49 Vt. 29 (1876); *Ridgefield, etc. R. R. v. Brush*, 43 Conn. 86 (1875); *Thigpen v. Mississippi Central R. R.*, 32 Miss. 347 (1856). A lawyer who subscribes for stock on an oral agreement that he should pay in services is nevertheless liable on the stock to corporate creditors where the services have not yet been performed. *Caston's Case*, 7 Ont. Rep. (Can.) 448 (1884).

² *Downie v. White*, 12 Wis. 176 (1860); *Wetherbee v. Baker*, 35 N. J. Eq. 501 (1882); *Centre, etc. Co. v. McConaby*, 16 Serg. & R. (Pa.) 140 (1827); *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293 (1875); *aff'd*, 67 N. Y. 294; *Peychaud v. Hood*, 23 La. Ann. 732 (1871); *Cleveland Iron Co. v. Ennor*, 12 Am. & Eng. Corp. Cas. 88 (Ill., 1886); *Robinson v. Pittsburgh, etc. R. R.*, 32 Pa. St. 334 (1858); *Graff v. Pittsburgh, etc. R. R.*, 31 Pa. St. 489 (1858); *Mann v. Cooke*, 20 Conn. 178

(1849); *Connecticut, etc. R. R. v. Bailey*, 24 Vt. 465 (1853); *Davidson's Case*, 3 De G. & S. 21 (1849), holding it to be a fraud on other subscribers, without requiring proof that there were such; *Bridger's Case*, L. R. 9 Eq. 74 (1869); *New Albany, etc. R. R. v. Slaughter*, 10 Ind. 218 (1858); *Blodgett v. Morrill*, 20 Vt. 509 (1848); *Minor v. Mechanics' Bank*, 1 Peters, 46 (1828); *Bates v. Lewis*, 3 Ohio St. 459 (1854); *Litchfield Bank v. Church*, 29 Conn. 137 (1860); *Mangles v. Grand Collier Dock Co.*, 10 Sim. 519 (1840); *Preston v. Grand Collier Dock Co.*, 2 Rail. Cas. 335 (1840); *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286 (1881). These cases hold that parol agreements are void as a fraud on corporate creditors and on other subscribers, and that the subscription is enforceable absolutely. It is no defense that there was a prior or contemporaneous oral agreement that the stock was not to be issued and the subscriber not to be held liable. *Wurtzbarger v. Anniston Rolling Mills*, 94 Ala. 640 (1891). It is no defense that another party had promised the stockholder that the former would pay for the stock. *Williams v. Benet*, 34 S. C. 112 (1891). A person sued as a subscriber cannot set up that he subscribed at the solicitation of another person who agreed to take the subscription off his hands at once. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, *Handley v. Stutz*, 139 U. S. 417.

³ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446 (1875); *White Mountains R. R. v. Eastman*, 34 N. H. 124 (1856). *Cf.* §§ 247, 465, *infra*. Or that the subscriber be released. *Gill v. Balis*, 72 Mo. 424 (1880).

corporation,¹ or that the subscriber might keep his stock, but should not be liable for the full par value thereof,² or that payment would not be demanded until certain work had been completed,³ or that the money would be applied to a particular part of the road,⁴ or that a certain part of the road would be completed within a certain time,⁵ or that the road will be extended to a certain point,⁶ or other parol conditions,⁷ or executory con-

¹ *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 505 (1871).

² *Custar v. Titusville Gas, etc. Co.*, 63 Pa. St. 381 (1869); *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537 (1881); *Upton v. Tribilcock*, 91 U. S. 45 (1875).

³ *La Grange, etc. Co. v. Mays*, 29 Mo. 64 (1859); *Clem v. Newcastle, etc. R. R.*, 9 Ind. 488 (1857), holding that such a promise is contradictory of the legal effect of the subscription; *Cincinnati, etc. R. R. v. Pearce*, 28 Ind. 502 (1867). A call on a subscription cannot be enjoined on the ground that it is in violation of a parol agreement of the promoters as to calls. *Christopher v. Noxon*, 4 Ont. Rep. (Can.) 672 (1883).

⁴ *Smith v. Tallassee, etc. Co.*, 30 Ala. 650 (1857). An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not so applied, but the receiver will not be directed to give up the money. *Moore v. Robertson*, 25 Abb. N. C. 173 (1890).

⁵ *Blair v. Buttolph*, 72 Iowa, 31 (1887).

⁶ *Low v. Studabaker*, 110 Ind. 57 (1887). Oral promises and statements that the road would be constructed on a certain route are no defense to a written subscription. *Chattanooga, etc. R. R. v. Warthen*, 98 Ga. 599 (1896).

⁷ *Topeka Mfg. Co. v. Hale*, 39 Kan. 23 (1888); *Marshall Foundry Co. v. Killian*, 29 N. C. 501 (1888). Parol evidence is inadmissible to add to a condition of a conditional subscription. *Miller v. Preston*, 4 N. M. 396

(1888). An oral agreement to take stock in payment of a note is no defense to the note. The corporation must pay it. *Tuscaloosa, etc. Co. v. Perry*, 85 Ala. 153 (1888). Where the agent of the railroad represented that a depot would be constructed at a certain place, a failure to so construct is good ground for enjoining the issue of municipal-aid bonds. *Wullenwaber v. Dunigan*, 30 Neb. 877 (1890). An oral contract that the subscriber was to be allowed to pay in property is good as against other stockholders who assented thereto, but such contract must be clearly proven. *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891). Where a note is given in payment for stock, and recites on its face that it is for value received, parol evidence is not admissible to show that the sale was on condition that the stock would afterwards pay a certain dividend, and in case such dividend was not paid the note was not to be paid. *Dinkler v. Baer*, 92 Ga. 432 (1893). It is no defense to a railroad stock subscription that defendant was to receive stock in a construction company, or that the control would not change hands, or that the company has sold all its property. *Russell v. Alabama Midland R'y*, 94 Ga. 510 (1894). Where, with a view to organizing a corporation, various parties sign a subscription list on the oral agreement that they might change the amount of their subscriptions, and one who signed for \$5,000 notified the chief promoter that he wanted but \$2,500, and the corporation, when organized,

tracts,—are held to be no defense to an action to collect the subscription.¹ Where, for the purpose of obtaining a subscription, a promise was made in behalf of the corporation that a branch road would be built, it was held that this promise was but an expression of an existing intention which was liable to be changed, and was no defense.² It was also held that a promise which, if carried out, would necessitate an *ultra vires* act by the corporation, is not binding, and is no defense.³

§ 139. *Corporations are chargeable with the fraudulent representations of their agents.*—At an early day in England it was held in a number of cases that corporations were not bound by the frauds of their agents in obtaining subscriptions to stock.⁴ This doctrine rested on the theory that the corporation gave the agent no power or authority to commit a fraud, and that, consequently, the fraud rendered the agent liable personally, but did not release or affect the subscription.

§ 140. The modern doctrine, however, both in this country and in England, has completely exploded the theory that corporations are not chargeable with the frauds of their agents in

made calls on him for only \$2,500, a corporate creditor cannot hold him for more. *White v. Kahn*, 103 Ala. 308 (1894). Where the capital stock proposed is stated, it is no defense that an attempt was made to increase it and that the subscriber supposed it was to be increased. *Glenn v. Hunt*, 120 Mo. 330 (1894).

¹ *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491 (1859); *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69 (1856); *New Albany, etc. R. R. v. Fields*, 10 Ind. 187 (1858); *East Tennessee, etc. R. R. v. Gammon*, 5 Sneed (Tenn.), 567 (1858); *Saffold v. Barnes*, 39 Miss. 399 (1860); *Payson v. Withers*, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29; *Goff v. Hawkeye Pump, etc. Co.*, 62 Iowa, 691 (1884); *Corwith v. Culver*, 69 Ill. 502 (1873). *Contra*, *Mahan v. Wood*, 44 Cal. 462 (1872), where the par value of the shares was not what was promised.

² *McAllister v. Indianapolis, etc. R. R.*, 15 Ind. 11 (1860). It is no defense

that the subscribers were told that branch offices would be established and that they had not been. *Guarantee, etc. Co. v. Mayer*, 141 Pa. St. 511 (1891).

³ *Johnson v. Crawfordsville, etc. R. R.*, 11 Ind. 280 (1858), where aid from another railroad was promised; *Peters v. Lincoln, etc. R. R.*, 14 Fed. Rep. 319 (1882), where an *ultra vires* lease was promised; *Baile v. Calvert, etc. Soc.*, 47 Md. 117 (1877).

⁴ *Dodgson's Case*, 3 De G. & Sm. 85 (1849); *Bernard's Case*, 5 De G. & Sm. 283 (1852); *Gibson's Case*, 2 De G. & J. 275 (1858); *Holt's Case*, 22 Beav. 48 (1856); *Felgate's Case*, 2 De G., J. & S. 456 (1865); *Mixer's Case*, 4 De G. & J. 575 (1859), where a prospectus was issued by the directors; *Ayre's Case*, 25 Beav. 513 (1858), the court holding that the corporation is bound by the misrepresentation only where it expressly authorized the particular statement made. *Cf. Barry v. Crosby*, 2 Johns. & Hem. 1 (1861).

taking subscriptions. The well-established rule now is that a corporation cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. The misrepresentations are not regarded as having actually been made by the corporation, but the corporation is not allowed to retain the benefit of the contract growing out of them, being liable to the extent that it has profited by such misrepresentations.¹ The question of the authority of the agent taking the subscription is immaterial herein. It matters not whether he had any authority, or exceeded his authority, or concealed its limitations.² The corporation cannot claim the benefits of his fraud without assuming also the representations which procured those benefits. Parol evidence is admissible to show the fraud, since it does not vary or contradict the contract, but shows that no contract was properly formed.³

§ 141. *The misrepresentations must be by authorized agents.* False representations by persons who do not act as intermediaries between the corporation and the subscriber in forming the

¹ *Western Bank v. Addie*, L. R. 1 Sc. App. 145 (1867); *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1 (1855); *Henderson v. Lacon*, L. R. 5 Eq. 249 (1867); *Ex parte Ginger*, 5 Ir. Ch. 174 (1856); *Montgomery Southern R'y v. Matthews*, 77 Ala. 357 (1884). The principles governing these contracts are the same as the principles governing contracts between private individuals. *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99 (1867); *Anderson v. Newcastle, etc. R. R.*, 12 Ind. 376 (1859); *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188 (1878); *Ranger v. Great Western R'y*, 5 H. L. Cas. 72 (1854); *Mackay v. Commercial Bank*, L. R. 5 P. C. 394 (1874). As regards representations in reference to bonds secured by mortgage and the right of a purchaser of bonds to complain, see *Van Weel v. Winston*, 115 U. S. 228 (1885).

² Where subscriptions were obtained by fraudulent statements of the officers, the corporation cannot defend against a bill to rescind by setting up that it was not bound

by such representations. *Garrison v. Technic, etc. Works*, 37 Atl. Rep. 741 (N. J., 1897); *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851). Provided, of course, that the misrepresentations were made by persons legally connected with the taking of the subscription. An agent to obtain subscriptions may use the ordinary means of accomplishing the object of his appointment, such as representing the location and quality of the lands, and the like. *Sandford v. Handy*, 23 Wend. 260 (1840). See also *Nelson v. Cowing*, 6 Hill, 336 (1844).

³ *New York Exchange Co. v. De Wolf*, 31 N. Y. 273 (1865). In Pennsylvania the peculiar rule prevails that the agent's misrepresentations affect the subscription, and are a defense only when the agent actually had or reasonably appeared to have authority to make representations. This was the ancient English doctrine, long since abandoned. *Custar v. Titusville Gas, etc. Co.*, 63 Pa. St. 381 (1869).

contract cannot bind the corporation nor affect the subscription. They are statements of outside parties.¹ The subscriber may have his action for damages against such persons for deceit, but he cannot charge the corporation with their misrepresentations. Sometimes, also, the misrepresentations even of persons connected with the corporation do not bind the corporation, inasmuch as their powers are purely statutory, or have nothing to do with the taking of subscriptions. Thus, while there has been considerable controversy in this country over the question of fraudulent representations by commissioners having statutory powers to take subscriptions, it is quite well settled that the subscriber is bound to know that the commissioners have no power to make representations, and that the corporation is not bound thereby.² So, also, it has been held that the representations by the president of the corporation do not bind it where he had no authority to take subscriptions.³ In Indiana it is held that an agent taking subscriptions before the incorporation of the company cannot bind it by his misrepresentations.⁴ A committee appointed at a public meeting

¹ *Cunningham v. Edgefield, etc. R. R.*, 2 Head (Tenn.), 23 (1858); *Jewett v. Valley R'y*, 34 Ohio St. 601 (1878). The representations made to him by other subscribers or outsiders are immaterial herein. His remedy is against them personally. *Duranty's Case*, 26 Beav. 268 (1858); *Ex parte Frowd*, 30 L. J. (Ch.) 322 (1861).

² *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256 (1871); *Bavington v. Pittsburgh, etc. R. R.*, 34 Pa. St. 358 (1859); *Wight v. Shelby R. R.*, 16 B. Mon. (Ky.) 4 (1855); *Rutz v. Esler, etc. Mfg. Co.*, 3 Ill. App. 83 (1878); *Syracuse, etc. R. R. v. Gere*, 4 Hun, 392 (1875); *North Carolina R. R. v. Leach*, 4 Jones, L. (N. C.) 340 (1857).

³ *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851); *Rives v. Montgomery, etc. Co.*, 30 Ala. 92 (1857). In all such cases, however, if the corporation accepts a subscription taken by an unauthorized agent, it cannot retain the subscription and repudiate the representations. It must assume

both or neither. A company is bound by a fraudulent statement made by its president. *Zang v. Adams*, 23 Colo. 408 (1897). Representations and declarations of a director to procure a bonus from the citizens of a town are ratified by the acceptance of the bonus by the company. *Gulf, etc. R'y v. Pittman*, 4 Tex. Civ. App. 167 (1893).

⁴ *Miller v. Wild Cat, etc. Co.*, 57 Ind. 241 (1877). In *Lynde v. Anglo-Italian, etc. Co.*, [1896] 1 Ch. 178, the court laid down the following rules as to who could bind the company by representations: (1) Where the misrepresentations are made by the directors, or other the general agents of the company entitled to act, and acting on its behalf; (2) where the misrepresentations are made by a special agent of the company while acting within the scope of his authority; (3) where the company can be held affected, before the contract is complete, with the knowledge that

to solicit subscriptions to a proposed corporation do not bind the corporation by their representations, and a subscriber cannot defend on the ground of false statements made by the committee.¹ If there is conflicting testimony as to the authority and status of the agent, the question is to be submitted to the jury.²

§ 142. *Corporation not bound by misrepresentations of officers at a public meeting.*—There is a difference of opinion among the authorities as to whether fraudulent representations made by one or more of the company's officers, at a public meeting called to promote the procuring of subscriptions, are chargeable against the corporation where such representations were not expressly authorized by the corporation. In New York, Iowa, Alabama, and Louisiana such misrepresentations do not bind the corporation.³ In Georgia and Wisconsin, on the other hand, such fraudulent representations are held to be admissible in evidence.⁴ The former rule seems to accord most with the modern tendency of the decisions, which go very far towards the enforcement of subscriptions after corporate creditors and other subscribers have become interested in the enterprise.

it is induced by misrepresentations; (4) where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue. The court held that a promoter who was not acting for the company did not bind the company by his statements.

A stockholder may rescind his subscription where he was induced to subscribe by a promoter who realized a secret profit from his option on the sale of land to the corporation, the promoter representing that others were the vendors of the land. *Virginia Land Co. v. Haupt*, 90 Va. 533 (1894). *Contra*, 45 S. W. Rep. 779.

¹ *St. Johns Mfg. Co. v. Munger*, 65 Minn. 90 (1895).

² *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 505 (1871); *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851).

³ *Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336 (1856); *First Nat. Bank v. Hurford*, 29 Iowa, 579 (1870); *Smith v. Tallassee, etc. Co.*, 30 Ala. 650 (1857), on the ground of a want of authority, which the subscriber is bound to know; *Vicksburg, etc. R. R. v. McKean*, 12 La. Ann. 638 (1857), on the ground that, if the rule were otherwise, "there will be very little security to those who loan money or render assistance to institutions of this kind."

⁴ *Atlanta, etc. R. R. v. Hodnett*, 36 Ga. 669 (1867); *McClellan v. Scott*, 24 Wis. 81 (1869). The question of representations at a public meeting was submitted to the jury in *Weems v. Georgia, etc. R. R.*, 88 Ga. 303 (1892).

§ 143. *The misrepresentations may arise by prospectuses.*—A prospectus issued by the authority of the directors or the stockholders of a corporation may be relied upon by a person in subscribing for stock; and if the prospectus contains a false representation, and the subscription is made by reason thereof, such representation is binding upon the corporation.¹ In this class of corporate instruments, however, it is held that some high coloring and even exaggeration is allowable. “In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure; and no prudent man will accept the prospects which are always held out by the originators of every new scheme without considerable abatement.”² So, also, if the language used in the prospectus admits of two meanings, the subscriber relying on it must ascertain which meaning is in-

¹ *Oakes v. Turquand*, L. R. 2 H. L. App. 325 (1867); *Re Metropolitan, etc. Assoc.*, [1892] 3 Ch. 1; *Ross v. Estates Investment Co.*, L. R. 3 Ch. App. 682 (1868); *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869); *Blake's Case*, 34 Beav. 639 (1865); *Henderson v. Lacon*, L. R. 5 Eq. 249 (1867). In England it is enacted, by section 38 of the Companies Act, 1867: “Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.” For the application of this important statute, see *Gover's*

Case, L. R. 20 Eq. 114 (1875); *Davidson v. Tulloch*, 3 Macq. 783 (1860); *Arkwright v. Newbold*, L. R. 17 Ch. D. 301 (1881); *Twycross v. Grant*, L. R. 2 C. P. D. 469 (1877); *Emma Silver Min. Co. v. Lewis*, L. R. 4 C. P. D. 396 (1879); *Bagnall v. Carlton*, L. R. 6 Ch. D. 371 (1877); *Plympton Min. Co. v. Wilkins*, 17 Weekly N. 66 (1882); *Sullivan v. Mitcalfe*, L. R. 5 C. P. D. 455 (1880); *Cornell v. Hay*, L. R. 8 C. P. 328 (1873). But a prospectus containing statements based upon a report of the vendor of property to the corporation, which report is appended to the prospectus, is no ground for rescission, even though the report is totally false. All the stockholders and the company relied equally thereon. *Ex parte Vickers*, 56 L. T. Rep. 815 (1887). Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived, to set aside their subscriptions. *Bosher v. Richmond, etc. Co.*, 89 Va. 455 (1892).

² *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99, 113 (1867).

tended.¹ Unless the representation distinctly refers to what is actually existing at the time, it must be taken to represent what will result when the enterprise is carried out, and will then be merely an expression of opinion. Nevertheless a subscriber may have rescission where the prospectus is not an honest, candid, straightforward document, but suggests that which is untrue and is in a high degree misleading.² If the general impression given by a prospectus is false and fraudulent, it is immaterial that no specific statement taken by itself is false.³ A subscriber can have rescission of his subscription on the ground that false representations were contained in a prospectus issued before the company was formed, where the company afterwards approves of such prospectus.⁴

§ 144. *Or by reports.*—So, also, a report made by the corporate officers to the stockholders may be relied on by one who contemplates subscribing for stock.⁵ The corporation cannot say that such reports were intended for the stockholders alone. The law holds that the report is known, and is intended to be known, to all persons who contemplate becoming stockholders, and is the same as though published to the world.⁶

§ 145. *Misrepresentations amounting to fraudulent representations.*—Any false statement by the authorized agents of a corporation in regard to the past or present status of the corporate enterprise or material matters connected therewith, whereby subscriptions are obtained, is a fraudulent representation.

Thus, a false statement that a certain amount of stock had been subscribed for;⁷ or that certain property had been pur-

¹Smith v. Chadwick, L. R. 9 App. Cas. 187 (1884); Hallows v. Fernie, L. R. 3 Ch. App. 467, 476 (1868), where the court say: "If [the words] may be construed in a different manner by different minds, it will be impossible to test the truth of any one man's assertion that he understood them in the sense in which they involved a misrepresentation." See also §§ 352, 353, *infra*.

²Scott v. Snyder, etc. Co., 67 L. T. Rep. 104 (1892).

³Aaron's Reefs v. Twiss, [1896] A. C. 273.

⁴Re Metropolitan, etc. Assoc., [1892] 3 Ch. 1.

⁵Western Bank v. Addie, L. R. 1 Sc. App. Cas. 145 (1867); New Brunswick, etc. R'y v. Conybeare, 9 H. L. Cas. 711 (1862).

⁶National Exch. Co. v. Drew, 32 Eng. L. & Eq. 1 (1855); Scott v. Dixon, 29 L. J. (Ex.) 62, n.; explained and adopted in Peek v. Gurney, L. R. 6 H. L. 377 (1873).

⁷Ross v. Estates Investment Co., L. R. 3 Ch. App. 682 (1868); Henderson v. Lacon, L. R. 5 Eq. 249 (1867). A statement that £200,000 had been

chased;¹ that the corporate property is unincumbered;² that the corporation is solvent and prosperous;³ that the directors have subscribed for stock;⁴ that certain individuals are directors;⁵ or as to the nature of the business to be undertaken;⁶ or, in

subscribed, when in fact owners of property had contracted to convey the same to the company for £200,000 of stock, is a material misrepresentation. *Arnison v. Smith*, 59 L. T. Rep. 627 (1888). It is fraud to state that a certain person had subscribed for stock when in fact his stock was given to him. It is not fraudulent that the mine on which the stock is sold would not pay for mining. A bill in equity lies to cancel a conveyance of land to pay for the stock. *Coles v. Kennedy*, 81 Iowa, 360 (1890).

¹ *Waldo v. Chicago, etc. R. R.*, 14 Wis. 575 (1861); *Ross v. Estates Investment Co.*, L. R. 3 Ch. App. 682 (1868). Or that the property contained valuable mines, in full operation, and with large daily returns. *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869). A representation that a certain patent-right owned by the company had been tested and found to be valuable, held not a misrepresentation, although it turns out to be worthless. *Denton v. Macneil*, L. R. 2 Eq. 352 (1866). A representation in good faith that title to land was good when in fact it was bad is not a misrepresentation. *New Brunswick, etc. R'y v. Conybeare*, 9 H. L. Cas. 711 (1862). But a misrepresentation that a government guaranty had been obtained is material. *Kisch v. Central R'y*, 34 L. J. (Ch.) 545 (1865). It is fraud to state that the company has purchased property when in fact it has merely purchased an option which the promoters had, and which they turned in at an extravagant figure. *Savage v. Bartlett*, 78 Md. 561 (1894). Where the secretary and treasurer represent that \$50,000 have been paid in, and that a mill had been

bought and paid for, and such representations were false, the subscriber may have the subscription set aside and may recover back the land and money which he has turned over to the corporation. *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313 (1893).

² *McClellan v. Scott*, 24 Wis. 81 (1869); *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655 (1876).

³ *Tyler v. Savage*, 143 U. S. 79 (1892); *Bell's Case*, 22 Beav. 35 (1856); *Melendy v. Keen*, 89 Ill. 395 (1878); *Western Bank v. Addie*, L. R. 1 Sc. App. Cas. 145 (1867). Not so, however, where the directors honestly figured in debts which afterwards turned out to be bad. *Jackson v. Turquand*, L. R. 4 H. L. 305 (1869). Directors were held liable to depositors for fraudulent representations as to the bank's solvency in *Seale v. Baker*, 70 Tex. 233 (1888).

⁴ *Henderson v. Lacon*, L. R. 5 Eq. 249 (1867).

⁵ *Blake's Case*, 34 Beav. 639 (1865); *Munster's Case*, 14 W. R. 957 (1866). Persons who have accepted are directors, although without the qualification shares. *Hallows v. Fernie*, L. R. 3 Ch. App. 467 (1868). A misrepresentation as to the directors is ground for repudiating the subscription. *Re Metropolitan, etc. Assoc.*, 64 L. T. Rep. 561 (1891); [1896] 3 Ch. 1. A misrepresentation as to who are the members of the council of administration is material and a rescission may be had. *Re Metropolitan, etc. Assoc.*, 62 L. T. Rep. 30 (1889).

⁶ *Blackburn's Case*, 3 Drew. 409 (1856). A person who has agreed to turn in property for stock may have the contract annulled on the ground that fraudulent representations were

England, where the memoranda or articles of the association are different from the prospectus;¹ or that work on the enterprise had reached a certain stage of completion;² or that a certain price had been paid for property when in fact a large part of the price went to promoters;³ or that the objects of the enterprise set forth in the subscription contract were of a certain nature, the subscriber not reading or hearing, and not being able to read, the contract,⁴ or other material misstatements of fact,⁵ have been held to constitute a fraudulent representation, entitling the subscriber induced thereby to subscribe to the remedies provided for him by law in such cases. In all these cases, however, the distinction between statements relative to the prospects and capabilities of the enterprise, and statements specifically specifying what does or does not exist, must be carefully borne in mind. The former are matters of opinion; the latter are material representations, and are fraudulent if false.⁶

made about the process of manufacture by the corporation. *Kelley v. Owens*, 30 Pac. Rep. 596 (Cal., 1892).

¹ *Downes v. Ship*, L. R. 3 H. L. 343 (1868); *Ex parte Briggs*, L. R. 1 Eq. 483 (1866); *Peel's Case*, L. R. 2 Ch. App. 674 (1867); *Lawrence's Case*, L. R. 2 Ch. App. 412 (1867); *Kincaid's Case*, L. R. 2 Ch. App. 420 (1867); *Wilkinson's Case*, L. R. 2 Ch. App. 536 (1867); *Stewart's Case*, L. R. 1 Ch. 574 (1866); *Whitehouse's Case*, L. R. 3 Eq. 790 (1867); *Taite's Case*, L. R. 3 Eq. 795 (1867); *Re Cachar Co.*, 36 L. J. (Ch.) 490 (1867); *Ship v. Crosskill*, L. R. 10 Eq. Cas. 73 (1870).

² *Ogilvie v. Currie*, 37 L. J. (Ch.) 541 (1868); *Ashley's Case*, L. R. 9 Eq. Cas. 263 (1870). False representations that sufficient funds were at hand to build a specified part of the road, being a different part from that which the defendant required by his subscription to be completed before payment, are immaterial. *Blair v. Buttolph*, 72 Iowa, 31 (1887).

³ *Capel v. Sim's, etc. Co.*, 58 L. T. Rep. 807 (1888). See also §§ 705-707, *infra*.

⁴ *Wert v. Crawfordsville, etc. Co.*, 19 Ind. 242 (1862).

⁵ See § 350, *infra*. A representation that only \$3,000 of stock and \$12,000 bonds per mile would be issued is fraudulent where \$12,000 of stock and \$15,000 of bonds per mile have already been issued. *Weems v. Georgia, etc. R. R.*, 84 Ga. 356 (1890). A statement of assets that include not only separate items for moving, exhibiting, etc., the aggregate value of the buildings being given also, but also outstanding accounts with no deductions for bad debts; accrued interest with no allowance for interest on liabilities; expenses of perfecting a machine, the latter not yet being a success; and money paid for expenses, it being also included in the value of the property,—is a false statement and sustains an action. *Hubbard v. Weare*, 79 Iowa, 678 (1890).

⁶ Whether the statement refers to a "possibility or a contingency, or an intention," or to an existing fact, is a question sometimes for the jury, sometimes for the judge; generally the latter. *Edgington v. Fitzmaur-*

§ 146. *Statements as to questions of law.*—Where a subscription is obtained by a false representation as to the legal effect of the subscription contract, or of corporate rights or liabilities, the subscriber has no remedy. He is bound to take notice of the law.¹ Thus, a misrepresentation as to the extent to which the subscriber would be liable on his stock,² or that he may allow his stock to be forfeited,³ or that payment would not be demanded until the enterprise was partly or wholly completed,⁴ is a statement as to the law. It states that something can be done which the law prohibits from being done.

§ 147. *Misrepresentation may be by suppression of the truth.* The misrepresentation entitling the subscriber to his remedies may consist in the suppression of what is true as well as in the assertion of what is false.⁵ Where any statement is made at all, it must be a fair and full statement of all the material facts. The corporate authorities, in issuing a prospectus, “are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to

rice, L. R. 29 Ch. D. 459 (1885). All the statements, together with the circumstances and history of the matter, are to be considered in deciding whether a misrepresentation was made. It is sufficient if the subscriber relied partly on the misrepresentation. He need not have relied on it exclusively. *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459 (1885). See also *Nicol's Case*, 3 De G. & J. 387, 430 (1858). The subscriber may, by contract, waive his right to rely on a representation. *Brownlie v. Campbell*, L. R. 5 App. Cas. 925 (1880).

¹ *Parker v. Thomas*, 19 Ind. 213 (1862).

² *Upton v. Tribilcock*, 91 U. S. 45 (1875), where the representation was that only a certain percentage could be called for. In *Upton v. Englehart*, 3 Dill. 496 (1874); S. C., 28 Fed. Cas. 835, this representation was held to be a defense, where it was made in one state with reference to the laws of another state. See also *Accidental, etc. Ins. Corp. v. Davis*, 15 L. T. 182 (1866), where it was repre-

sented that further calls were not contemplated.

³ *Northeastern R. R. v. Rodrigues*, 10 Rich. (S. C.) L. 278 (1857).

⁴ *Clem v. Newcastle, etc. R. R.*, 9 Ind. 488 (1857); *New Albany, etc. R. R. v. Fields*, 10 Ind. 187 (1858). For representation as to the route, see *Ellison v. Mobile, etc. R. R.*, 36 Miss. 572 (1858); *Wight v. Shelby R. R.*, 16 B. Mon. (Ky.) 4 (1855).

⁵ “No mistatement or concealment of any material facts or circumstances ought to be permitted. . . . The suppression of a fact will often amount to a misrepresentation.” *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99, 113, 114 (1867). In *Oakes v. Turquand*, L. R. 2 H. L. Cas. 325, 342 (1867), the court say the prospectus is objectionable, “not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood.”

omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.”¹ A prospectus need not state all the facts, but it must state facts the omission of which would render the prospectus, as it stands, misleading.² Thus, an omission to state that a very large sum had been paid for property, the merits of which were fully set forth, has been held to be equivalent to a fraudulent representation.³ On the other hand, a failure to state that large sums were paid to the directors to induce them to act as such was held not to be a fraudulent omission.⁴

§ 148. *Misrepresentation may be by statements made without knowledge of their falsity.*—Statements need not be intentionally false in order to amount to a fraudulent representation.⁵ A false statement, made in good faith but in ignorance, is, in a

¹ *New Brunswick, etc. R’y v. Muggeridge*, 1 Dr. & Sm. 363, 381 (1860). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern, the concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business, and statements leading to the conclusion that all subscribers for stock stood on an equal footing, constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. *Walker v. Anglo-American, etc. Co.*, 72 Hun, 334, 341 (1893). It is no defense that the party taking the subscription concealed the fact that the charter was to allow the company to subscribe for stock in other companies, the subscription being made before the incorporation. *Oil City, etc. Co. v. Porter*, 35 S. W. Rep. 643 (Ky., 1896).

² *McKeown v. Boudard, etc. Co.*, 74

L. T. Rep. 712 (1896), aff’g 74 L. T. Rep. 310.

³ *Venezuela Central R’y v. Kisch*, L. R. 2 H. L. App. 99 (1867). In *Gover’s Case*, L. R. 1 Ch. D. 182 (1875), under different circumstances, the contrary was held.

⁴ *Heymann v. European Central R’y*, L. R. 7 Eq. 154 (1868). A disclosure need not be made that stock had been given to the directors and promoters in payment for services. *Pulsford v. Richards*, 17 Beav. 87 (1853). Nor as to the amount of stock already subscribed. *Vane v. Cobbold*, 1 Exch. 798 (1848).

⁵ Corporate agents, making representations in order to obtain subscriptions, are bound to know the truth or falsity of such statements. *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869); aff’g *Smith v. Reese River Co.*, L. R. 2 Eq. 264 (1866); *Glamorganshire Iron, etc. Co. v. Irvine*, 4 F. & F. 947 (1866), applying the same rule at law. The English case of *Kennedy v. Panama, etc. Co.*, L. R. 2 Q. B. 580 (1867), holds, however, that “where there has been an innocent misrepresentation or misapprehen-

legal point of view, the same as an assertion which the party knew to be untrue.¹ Thus, a prospectus issued by the directors, representing the corporate property as containing valuable mines, all of which was in good faith, but false, is the same as though the statements were made with knowledge of their falsity. Where, however, the statement in good faith was that the corporation had a government contract, which, upon litigation, was found to be untrue, the representation was held not to be fraudulent.²

§ 149. *Misrepresentations that are insufficient.*—It is not every misrepresentation that enables a subscriber to set up that he was induced to subscribe by fraud.³ Thus, an honest mis-

sion, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration," and that to hold otherwise would be to make a warranty out of the representation. In *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459 (1885), the court say that a statement of fact, which the person making does not know the truth of, is, "in the eye of the law, a fraudulent statement as much as if the persons making it had known it to be false." In this country the cases seem to favor a different rule. The party making the representations must be proven "to have had a fraudulent purpose in contemplation, or at least to have known that the statements were untrue." *Nugent v. Cincinnati, etc. R. R.*, 2 Disney (Ohio), 302 (1858); *Selma, etc. R. R. v. Anderson*, 51 Miss. 829 (1876); *Cunningham v. Edgefield, etc. R. R.*, 2 Head (Tenn.), 23 (1858). See also *Chitty, Contracts*, 12th ed., p. 692 *et seq.*, and *Montgomery Southern R'y v. Matthews*, 77 Ala. 357 (1884). The vigorous case of *Henderson v. Railroad Co.*, 17 Tex. 560 (1856), effectively presents the opposite view; and see § 356, *infra*. See also 1 Story, Eq. Jur., § 193; *Story, Agency*, §§ 127, 135, 137, 452.

¹ *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869).

² *Kennedy v. Panama, etc. Co.*, L. R. 2 Q. B. 580 (1867).

³ Mere matters of opinion as to whether the enterprise can be completed, or when it will be completed, or the prospects of profits, cannot be misrepresentations. The subscriber is bound to know that these are all matters of mere conjecture. *Brownlee v. Ohio, etc. R. R.*, 18 Ind. 68 (1862); *Pickering v. Templeton*, 2 Mo. App. 424 (1876); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Hardy v. Merriweather*, 14 Ind. 203 (1860); *Andrews v. Ohio, etc. R. R.*, 14 Ind. 169 (1860); *Bish v. Bradford*, 17 Ind. 490 (1861); *Walker v. Mobile, etc. R. R.*, 34 Miss. 245 (1857); *Coil v. Pittsburgh Female College*, 40 Pa. St. 439 (1861). Statements as to when the road would be completed are not such representations as will avoid a subscription for stock. *Jefferson v. Hewitt*, 95 Cal. 535 (1892). The fact that statements as to the affairs of the company are not filed as required by statute does not amount to fraud in the sale of stock; nor do representations that the stock will pay twenty per cent dividends amount to fraud. The question as to validity of stock, having once been litigated, cannot be again raised in an action for de-

take of judgment, on the part of the directors, as to the collectibility of certain debts, whereby a company represented to be solvent turns out to be insolvent, is not a fraudulent representation. So, also, of a representation as to the value of a patent-right, which, it was stated, would be tested further. On the other hand, a statement made with the intent to defraud the subscriber, but without that effect, is immaterial; mere intent without damage is insufficient.¹ A misstatement as to the contents of the subscription contract which the subscriber signs is immaterial, where he can read but does not.² And where false representations are made, but before the subscription is completed the representations are made good by intervening events, the subscribers cannot complain.³ Frauds of the directors which are not the subject of a representation are not to be remedied by the principle of law governing the subject of false representation.⁴ A statement as to the dividends that

ceit in the sale of the stock. The mere act of conspiracy is not sufficient to sustain the action unless damage is shown. *Robertson v. Parks*, 76 Md. 118 (1892). Representations that the stock would be a good investment and pay dividends, etc., constitute no defense. *Weston v. Columbus Southern R'y*, 90 Ga. 289 (1892). Statements that the business will be profitable, etc., are mere "trade talk," and not fraud. *Riley v. Treanor*, 25 S. W. Rep. 1054 (Tex., 1894). In the cases, however, of *Gerhard v. Bates*, 17 Jur. 1097 (1853), and *Taylor v. Ashton*, 11 M. & W. 401 (1843), it was held that a false guaranty of the promoters that a certain dividend would result from the enterprise constituted a false representation. *Re National, etc. Fuel Co.*, 4 Drew. 529 (1859), held that one sued as a contributory cannot plead fraudulent misrepresentation on the part of the company, although it was arranged between the directors and shareholders that certain shares (of which these were a part) should have a preference. A statement as to the purpose for which the proceeds of

bonds will be used by the company is immaterial. The bondholder cannot rescind. *Banque, etc. v. Brown*, 34 Fed. Rep. 162, 198 (1888). Stock may be issued before payment by machinery is made. An action by another stockholder for cancellation of the stock on the ground of fraud fails unless there is clear proof that the person agreed that the machinery would succeed. *Pendleton Mfg. Co. v. Mahanna*, 18 Pac. Rep. 563 (Oreg., 1888). See *Winget v. Quincy, etc. Assoc.*, 128 Ill. 67 (1889). A false statement as to the purposes of a proposed corporation is held not to be material in Indiana. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329 (1896).

¹ *Keller v. Johnson*, 11 Ind. 337 (1858); *Cunningham v. Edgefield, etc. R. R.*, 2 Head (Tenn.), 23 (1858).

² *Thornburgh v. Newcastle, etc. R. R.*, 14 Ind. 499 (1860).

³ *Ship v. Crosskill*, L. R. 10 Eq. 73 (1870).

⁴ *Hornaday v. Indiana, etc. R'y*, 9 Ind. 263 (1857); *Heymann v. European, etc. R'y*, L. R. 7 Eq. Cas. 154 (1868).

will be paid is not a misrepresentation,¹ inasmuch as this is merely an opinion as to the future.

§ 150. *Subscriber is not bound to investigate the truth of representations.*—If a subscriber has used reasonable caution and judgment in accepting the statements of corporate agents, it is no answer to his claim that he was induced to subscribe by fraudulent representations, to say that by proper inquiry he might have learned the truth, or by more vigilance he might have discovered the deception.² Where the representations are by a prospectus, he is not obliged to examine documents referred to, even though such examination would have shown the falsity of the representations.³ It is not incumbent upon him to institute inquiries, and to suspect fraud when all seems fair. But where the means of information are open equally to both parties, the subscriber has no right to rely upon the representations of the corporate agent, unless the latter dissuades the subscriber from investigation.⁴ So, also, where the subscriber reads several documents, he cannot rely on representations in one which are corrected and limited by statements in the others, even though he claims to have overlooked such corrections.⁵

§ 151. *Subscriptions induced by fraudulent representations are not void, but only voidable.*—The principle of law that fraud vitiates all contracts applies to a contract of subscription; but

¹ *Swan v. Mathre*, 72 N. W. Rep. 522 (Iowa, 1897). See also n. 3, p. 297.

² *New Brunswick, etc. R'y v. Mugeridge*, 1 Dr. & Sm. 363 (1860); *Upton v. Englehart*, 3 Dill. 496 (1874); S. C., 28 Fed. Cas. 835; *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99 (1867); *Ex parte West*, 56 L. T. Rep. 622 (1887). Cf. *Hallows v. Fernie*, L. R. 3 Ch. App. 467 (1868). The subscriber is not bound to investigate the truth of statements which the other party, with full knowledge of the facts, makes. *McClellan v. Scott*, 24 Wis. 81 (1869). False statements as to who are the other subscribers are no defense where the subscriber has opportunity to ascertain the facts. *Haskell v. Worthington*, 94 Mo. 560 (1888). Cf. 29 S. E. Rep. 291.

³ *Kisch v. Venezuela Central R'y*, 34 L. J. (Ch.) 545 (1865); *Venezuela*

Central R'y v. Kisch, L. R. 2 H. L. App. 99 (1867). In New York the general principle of law governing cases of misrepresentation is clearly stated to be that "every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." *Mead v. Bunn*, 32 N. Y. 274 (1865).

⁴ *Jennings v. Broughton*, 22 L. J. (Ch.) 585 (1853); *Walker v. Mobile*, etc. R. R., 34 Miss. 245 (1857).

⁵ *Scholey v. Venezuela Central R'y*, L. R. 9 Eq. 266, n. (1868).

this principle means, not that the contract is void *per se* from the formation of the contract, but that the contract is voidable, at the option or election of the person defrauded.¹ Until such election is exercised, the contract is enforceable by both or either of the parties. Hence a subscription to stock, obtained by fraudulent representations, is not void from the time when it was made, nor is it void until it is ratified and confirmed by the defrauded subscriber, but it is valid until it is expressly rescinded and repudiated by the subscriber.² This principle is important in determining the method of rescission, and particularly the time within which a rescission must be made.

§ 152. *Remedies of a subscriber induced to subscribe by fraudulent representations.*—There are, in general, five different remedies which are open to a subscriber induced to subscribe by fraud. He may, upon discovering the fraud, rescind the subscription by notification to the corporate authorities, without taking legal proceedings; or he may wait until sued upon the subscription, and then set up the fraud as a defense to the action at law; or he may file a bill in equity to restrain such suits at law, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscription; or he may bring an action at law against the parties fraudulently inducing the subscription, and recover damages for the deceit; or he may sue for money had and received. An officer who, by false and fraudulent statements, induces parties to subscribe and pay for shares of stock may be criminally liable for obtaining money under false pretenses, even though the money was paid to the corporation and not to him.³

§ 153. *Rescission without legal proceedings.*—It is the duty and the right of directors, without waiting for a bill in equity or other legal proceedings, to revoke a subscription contract, and remove from the stockholders' list the name of a subscriber who reasonably proves that he was induced to subscribe by fraudulent representations chargeable to the corporation, and who requests a rescission of the subscription.⁴ The directors

¹ *Oakes v. Turquand*, L. R. 2 H. L. App. 325 (1867); *Upton v. Englehart*, 3 Dill. 496 (1874); S. C., 28 Fed. Cas. 835; *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869).

² *Tennant v. City of Glasgow Bank*, L. R. 4 App. Cas. 615 (1879).

³ *Commonwealth v. Langley*, 47 N. E. Rep. 511 (Mass., 1897).

⁴ *Wright's Case*, L. R. 12 Eq. 331

are not bound to make a hopeless defense. It is an ordinary business act within the powers of the directors, and their discretion is not to be controlled unless unreasonably exercised. Where, upon such a demand being made by the subscriber, the directors refuse to dissolve the subscription contract, the subscriber need not always resort to a bill in equity to have the contract set aside for fraud.¹ A mere notification to the corporation is generally sufficient.²

§ 154. *False representation as a defense to an action at law for calls.*—The most common remedy of a subscriber induced by fraud to subscribe is to wait until the corporation brings suit to collect the subscriptions, and then to set up the fraud as a defense. Nearly all of the cases in this country are cases where this remedy has been adopted.³ A transferee of stock cannot set up the defense that the transferrer was induced by fraud to subscribe.⁴

§ 155. *Remedy by bill in equity.*—This is the fairest, safest and most complete remedy that the subscriber has. It is a decisive notice to the corporation and all third parties not to rely upon the subscription in question. It avoids the risk of future

(1871); S. C., L. R. 7 Ch. 55 (1871); Blake's Case, 34 Beav. 639 (1865); Reese River, etc. Co. v. Smith, L. R. 4 H. L. 64 (1869), affirming Smith v. Reese River Co., L. R. 2 Eq. 264 (1866); *Re Etna Ins. Co., Ex parte Shiels*, Ir. R. 7 Eq. 264 (1873); Bath's Case, L. R. 8 Ch. D. 334 (1878). See also Fox's Case, L. R. 5 Eq. 118 (1868).

¹ In England mere repudiation, not followed by anything more, is insufficient. *Re Scottish Petroleum Co.*, L. R. 23 Ch. D. 413 (1883), where the directors refused to allow the rescission. *Re Lennox, etc. Co.*, 62 L. T. Rep. 791 (1890). See also Hare's Case, L. R. 4 Ch. 503 (1869); Steel's Case, 49 L. J. (Ch.) 176 (1879).

² It is not necessary for a subscriber who has been induced to subscribe by fraudulent misrepresentations to file a bill to have his subscription rescinded. A notice to the company that he rescinds the subscriptions, giving the reasons therefor, is suffi-

cient. *Savage v. Bartlett*, 78 Md. 561 (1894), pointing out the fact also that the English decisions on this subject are controlled by the English statute.

³ "It is a good answer at common law to an action for calls that the defendant was induced to become the holder of the shares by the fraud of the plaintiffs." *Bwlch-y-plwm Lead M. Co. v. Baynes*, 36 L. J. (Ex.) 183 (1867); *Deposit, etc. Co. v. Ayscough*, 6 El. & B. 761 (1856), where the defense failed because it did not state that the defendant had renounced any benefits; *Sandford v. Handy*, 23 Wend. 260 (1840). Cf. *Upper San Joaquin Canal Co. v. Roach*, 78 Cal. 552 (1889), holding that this defense must be set up by way of counterclaim for damages on account of misrepresentations where a note had been given and the stock not returned.

⁴ *Berryville, etc. Co. v. Lewis*, 19 S. E. Rep. 781 (Va., 1894).

corporate insolvency. It is the customary, and it seems favorite, remedy in England, and has been clearly upheld in this country.¹ It enables the subscriber to set aside the contract, to enjoin actions at law for calls, and to recover back payments made before discovery of the fraud.²

§ 156. The complainant in a bill in equity to set aside a subscription obtained by fraud cannot sue in behalf of himself and others who may wish to come in. But several subscribers, defrauded in the same way, may join in the bill as co-complainants.³ Fraudulent intent need not be proved. *Scienter* is not

¹ Where a person is induced to subscribe for stock on the fraudulent representations of the president that the company is in a prosperous condition, the person may file a bill in equity to recover back the money; and equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation and concealment. Both the company and the president individually were made defendants and held liable. *Tyler v. Savage*, 143 U. S. 79 (1892). A person induced by fraud to subscribe for stock may bring an equitable action to procure a rescission of the contract, a cancellation of her subscription, and the removal of the name from the stock books. The statute of limitations does not begin to run until the fraud is discovered. *Bosley v. National Machine Co.*, 123 N. Y. 550 (1890); *S. C.*, 6 N. Y. Supp. 4 (1889); *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162, 198 (1888); *Waldo v. Chicago, etc. R. R.*, 14 Wis. 575 (1861); *Henderson v. Railroad Co.*, 17 Tex. 560 (1856); *Rawlins v. Wickham*, 3 De G. & J. 304 (1858). A court of equity has jurisdiction to cancel a subscription to stock on the ground of fraud, and it is not necessary that the subscriber resort to an action of deceit. *Negley v. Hagerstown, etc. Co.*, 39 Atl. Rep. 506 (Md., 1898). And see the various English cases in this chapter. See also § 356, *infra*.

² But the injunction to restrain the

action at law will not be granted if the subscriber delays until the case is about to be tried. *Thorpe v. Hughes*, 3 Myl. & C. 742 (1838). And where the stock has been fully paid, and no injury can come from the delay, equity will not sustain the subscriber's bill to compel repayment, but will send him to a court of law, where a jury may pass upon the question of fraud. *Askew's Case*, L. R. 9 Ch. 664 (1874). Equity, however, unquestionably has concurrent jurisdiction if it cares to exercise it. *Hill v. Lane*, L. R. 11 Eq. 215 (1870), criticising *Ogilvie v. Currie*, 37 L. J. (Ch.) 541 (1868). See also § 356, *infra*. And will enjoin the collection of the subscription pending the suit. *Walsh v. Seager*, 1 N. Y. St. Rep. 189 (1886). But the equitable action will not be enjoined merely because the corporation subsequently becomes insolvent, and a receiver is appointed. *Walsh v. Seager*, 1 N. Y. St. Rep. 189 (1886).

³ Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived, to set aside their subscriptions. *Bosher v. Richmond, etc. Co.*, 89 Va. 455 (1892). Several stockholders may join in filing a bill to rescind a subscription for stock on the ground that they were induced to subscribe by false representations that the cor-

the essence of the action.¹ The corporation is to be a defendant, and if merely a cancellation of the subscription and an injunction against suits at law are sought, the corporation, it seems, may be the sole defendant. A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovering the fraud.² This relief dispenses with an action at law for damages for deceit, and when sought for in the bill in equity the guilty directors must be made parties. The bill is not multifarious by reason of its containing prayers for these various kinds of relief.³

§ 157. *Remedy by an action at law for deceit.*—An action at law for damages for deceit lies at the instance of a subscriber for stock, fraudulently induced to subscribe, against the persons guilty of the fraud.⁴ The fraudulent representation, how-

poration had a certain amount of paid-up capital, was out of debt and doing a profitable business, and that the subscribers would be employed. The corporation may be enjoined from transferring its assets in the meantime, and may be compelled to pay back the money paid by complainants. *Sherman v. American Stove Co.*, 85 Mich. 169 (1891). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation. *Brewster v. Hatch*, 122 N. Y. 349 (1890). Several stockholders may join in one bill to rescind their subscriptions for fraud, even though the fraud practiced on one differed from that on others. *Carey v. Coffee, etc. Co.*, 20 S. E. Rep. 778 (Va., 1894). A transferee of the shares cannot bring the suit. The fraud is personal to the original subscriber. *Duranty's Case*, 26 Beav. 268 (1858).

¹ See § 356, *infra*.

² *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188 (1878). Where subscribers bring suit to set aside sub-

scriptions and for repayment thereof, for fraud, and join the directors as co-defendants, the directors are not nominal parties. *Seddon v. Virginia, etc. Co.*, 36 Fed. Rep. 6 (1888). If the suit is in equity for damages, intent must be shown. *Hubbard v. Wear*, 79 Iowa, 678 (1890).

³ Nor is it multifarious because it joins such a suit with one by the corporation to compel the directors to account to the corporation for the same fraud. *Ashmear v. Colby*, 26 Conn. 287 (1857).

⁴ *Clarke v. Dickson*, 6 C. B. (N. S.) 453 (1859); *Miller v. Barber*, 66 N. Y. 558 (1876); *Paddock v. Fletcher*, 42 Vt. 389 (1869). In England the liability of the directors herein is enforced generally in connection with a suit in equity, and as a part of the equitable decree. This is under a statute. *Western Bank v. Addie*, L. R. 1 Sc. App. Cas. 145 (1867). A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be ben-

ever, which must be proved to sustain this action must be a more intentional fraud than the one which suffices to rescind the contract. The subscriber must prove that a material false representation was made by the defendant; that the defendant recklessly made it or knew the representation to be false; that the plaintiff subscribed by reason, partially at least, of that representation, and that he was thereby injured.¹ The gist of

effited by the deceit, or that he should collude with the person thus benefited. 1 Smith, Lead. Cas. (9th Am. ed.), pp. 320, etc., as applicable to misrepresentations inducing subscriptions. *Brewster v. Hatch*, 10 Abb. N. Cas. 400 (1881); aff'd, 122 N. Y. 349 (1890), sustains an action by subscribers for stock, for damages, for false representations by promoters as to the real cost of property purchased by the latter for the corporation. See also ch. XXXIX. There is no remedy at law or in equity against the estate of a deceased director herein except for property received by him. *Peek v. Gurney*, L. R. 6 H. L. 377 (1873). Subscribers to debentures may recover back the difference between the actual value of the debentures and the price paid. *Arnison v. Smith*, 59 L. T. Rep. 627 (1888); aff'd, L. R. 40 Ch. D. 567 (1889).

¹ In the important case of *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889), the House of Lords decided that in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man make a false statement honestly believing it to be true, it is not sufficient to support an action of deceit to show that he had no reasonable grounds for his belief. The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a

great saving in working would be effected. At the time of making this statement they had not in fact obtained authority to use steam power, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below, *Peek v. Derry*, L. R. 37 Ch. D. 541—1888), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. In an action for deceit by a misrepresentation in a prospectus as to the net profit on the capital employed, the action being against one who was a promoter, and also one of the vendors, and whose name appeared in the prospectus, and who became a director, the plaintiff must prove (1) that the defendant's statement was untrue; (2) that it was dishonest; (3) that he believed it to be untrue. See also *Glasier v. Rolls*, L. R. 42 Ch. D. 436 (1889), following the House of Lords in *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889). See also *Ship v. Crosskill*, L. R. 10 Eq. Cas. 73 (1870). To sustain an action for deceit the plaintiff must show "that the defendants intended that people should act on the statements, that the statements are untrue in fact, and that the defendants knew them to be untrue, or made them under such circumstances that the court must conclude that they were careless whether they were true or not;" also that the statements were relied upon, acted on, and damage sustained. *Edgington v. Fitzmaurice*, L. R. 29 Ch.

the action is fraudulent intent.¹ It cannot be maintained against the corporation, because the corporation, though liable to refund fraudulently acquired property, is not capable of a fraudulent intent.² It has been held, however, that a subscriber,

D. 459 (1885). Reliance on the misrepresentations must be shown. *Priest v. White*, 89 Mo. 609 (1886).

¹ *Scienter* is fixed on the directors, making them liable in damages upon proof of incorrect representations, known to them to be incorrect, knowingly stated by them, and acted on by the plaintiff subscriber. *Henderson v. Lacon*, L. R. 5 Eq. Cas. 249 (1867); *Cargill v. Bower*, L. R. 10 Ch. D. 502 (1878). See also *Bale v. Cleland*, 4 F. & F. 117 (1864); and see p. 148, n. 5, *supra*. Must allege knowledge and intent to deceive on their part. "Falsely and fraudulently represented" does not properly plead the *scienter*. *Mabey v. Adams*, 3 Bosw. 346 (1858). In case the representations are not fraudulent as against the corporation, they are not sufficient to entitle the subscriber to recover from the directors. *Heymann v. European Cent. R'y*, L. R. 7 Eq. 154 (1868). A subscriber for stock may hold the president liable for false representations made by the latter to other persons with an intent that the plaintiff be induced to act upon them. The false representations of the president that a dividend had been earned bind him, where he paid close attention to its affairs, and where such dividend was made on an improper and untrue statement of assets and liabilities. It must be proven that the defendant president knew that the representations were false, but this may be proven by inference. A stockholder who is induced to make still further subscriptions by reason of misrepresentations of an officer may hold him liable. *Hubbard v. Weare*, 79 Iowa, 678 (1890). The directors are personally liable

in an action for deceit where a prospectus falsely states that guaranteed dividends were secured by a deposit of certain securities, and a person subscribes for stock relying upon such statements. *Knox v. Hayman*, 67 L. T. Rep. 137 (1892).

² *Mixer's Case*, 4 De G. & J. 575 (1859); *Duranty's Case*, 26 Beav. 268 (1858); *Western Bank v. Addie*, L. R. 1 Sc. App. Cas. 145 (1867); *Abraath v. Northeastern R'y*, L. R. 11 App. Cas. 247 (1886); *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317 (1880); *Benjamin, Sales* (Bennett's ed. 1888), § 467a. *Contra*, *Peebles v. Patapsco Guano Co.*, 77 N. C. 233 (1877); *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259 (1867); *Mackay v. Commercial Bank*, L. R. 5 P. C. 394 (1874), not stock cases, but distinctly holding that a corporation is liable to an action for damages for deceit. Where, however, the old corporation organizes a new corporation, and has the latter build a competing road on a new line, a stockholder of the old who contributed lands, etc., may have an action for damages against it. *Chapman v. Mad River, etc. R. R.*, 6 Ohio St. 119 (1856). A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable in an action for damages for deceit, on the ground that its published statements were false and fraudulent, and that he relied on those statements. *Merchants' Nat. Bank v. Armstrong*, 65 Fed. Rep. 932 (1895). See also article in 1 R'y & Corp. L. J. 122; *Buffalo, etc. Co. v. Standard Oil Co.*, 42 Hun, 153 (1886); also § 44. Where a subscriber is told that his money goes to the corpora-

when sued upon a subscription, may set off damages due to misrepresentations inducing him to subscribe, made by an agent of the corporation in obtaining the subscription.¹

§ 158. The directors are not liable to an action for deceit by reason of the frauds of their agents,² nor is an innocent director liable for the fraudulent representations of his co-directors—not even though the evidences of their fraud were entered on the corporate books, there being no ground for suspicion on his part.³

A director cannot be held liable for false representations contained in the articles of association, which were made before he became a director.⁴ But a director who stands by and allows a co-director to make the false representations is equally chargeable with the injury done thereby.⁵ The false representations supporting an action for deceit may have been by corporate reports or prospectuses, or by personal statements.⁶ Promoters who make fraudulent representations as to their profits may be held personally responsible.⁷

§ 159. *Remedy by action for money had and received.*—Where a subscriber pays his subscription in part or wholly, and afterwards discovers that the representations whereby he was induced to subscribe were fraudulent, he may bring an action at

tion when in fact it is divided among the promoters, he may sue the corporation for fraudulent representations, even though he has settled with the promoters, he not being aware of the fraud at the time of such settlement. *Hunter v. French, etc. Co.*, 65 N. W. Rep. 828 (Iowa, 1896).

¹ *Owens v. Boyd, etc. Co.*, 28 S. E. Rep. 950 (Va., 1898).

² *Weir v. Barnett*, L. R. 3 Exch. D. 32 (1877); *Weir v. Bell*, L. R. 3 Exch. D. 238 (1878); *Eaglesfield v. Londonderry (H. L.)*, 26 W. R. 540 (1878). See also *Cargill v. Bower*, L. R. 10 Ch. D. 503 (1878); *Watson v. Earl Charlemont*, 12 Q. B. 856 (1848); *Arthur v. Griswold*, 55 N. Y. 400 (1874).

³ *Re Denham*, L. R. 25 Ch. D. 752 (1883).

⁴ *Mabey v. Adams*, 3 Bosw. 346 (1858).

⁵ *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188 (1878).

⁶ For a complaint seeking to hold national-bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see *Prescott v. Haughey*, 65 Fed. Rep. 653 (1895).

⁷ See § 705, *infra*. In *Franey v. Warner*, 71 N. W. Rep. 81 (Wis., 1897), where promoters purchased land for \$32,000 and sold it to the corporation for \$45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. See 28 N. Y. App. Div. 433.

law for money had and received, and recover back from the corporation the money so received.¹

§ 160. *Ratification as a bar to the subscriber's remedies.*—A subscription contract obtained by fraudulent representations may cease to be voidable and may become absolutely binding by acts of ratification. Any act of the subscriber, inconsistent with an intention to disaffirm the contract, will constitute a ratification of the subscription and a waiver of the right to avoid it by reason of fraud, provided the subscriber knew of the fraud at the time of such ratifying act. Thus, where the subscriber, after knowledge of the fraud, receives dividends, sells part of the stock,² instructs his broker to sell,³ participates in the meetings,⁴ pays calls,⁵ or, in general, accepts any corporate

¹ Grangers' Ins. Co. v. Turner, 61 Ga. 561 (1878); Hamilton v. Grangers', etc. Ins. Co., 67 Ga. 145 (1881). But the subscriber cannot retain the stock and also sue. Houldsworth v. City of Glasgow Bank, L. R. 5 App. Cas. 317 (1880). See Jarrett v. Kennedy, 6 C. B. 319 (1848), where assumpsit for money had and received, brought against the directors to compel them to repay money paid on a subscription obtained by fraud, was sustained, without involving the question of a fraudulent intent. See Bruce v. Nickerson, 141 Mass. 403 (1886). The action for money had and received cannot be brought against other stockholders for the fraud of a promoter. Perry v. Hale, 143 Mass. 540 (1887).

² But a sale of a part of the stock before the subscriber discovers the fraud is no bar to a rescission as to the rest. *Ex parte* West, 56 L. T. Rep. 622 (1887). A subscriber to stock cannot rescind for fraud, when he

has had the stock transferred to his infant children, unless their right thereto is also tendered back. Francis v. New York, etc. R. R., 108 N. Y. 93 (1888).

³ *Ex parte* Briggs, L. R. 1 Eq. 483 (1866).

⁴ Harrison v. Heathorn, 6 Man. & G. 81 (1843); Chaffin v. Cummings, 37 Me. 76 (1853). A subscriber who acts as director and manager, and purchases lots from the company, cannot rescind his subscription on the ground that certain newspaper articles prepared by himself and others contain misrepresentations. Raymond v. San Gabriel, etc. Co., 53 Fed. Rep. 883 (1893). Where the defrauded party to whom stock has been issued for land does not rescind promptly, but acts as director and allows improvements to be made on the land, he cannot rescind at all. Foley v. Holtry, 41 Neb. 563 (1894). A person may defeat notes given for stock

⁵ Scholey v. Venezuela Central R'y, L. R. 9 Eq. 266, n. (1870). But not where he paid under compulsion. Ayre's Case, 25 Beav. 513 (1858). A payment of a call on a subscription is not a waiver of the defense that the corporation has been formed for different purposes than were repre-

sented by the promoters at the time of the subscription, where the subscriber did not know that fact when he paid. Strong v. Southwestern, etc. Co., 38 S. W. Rep. 546 (Tex., 1896). A partial payment with full knowledge is a waiver, *Re* Dunlop-Truffault, etc. Co., 75 L. T. Rep. 385 (1896).

benefit or continues to act as a stockholder,¹ he will be held to have waived all objections to the fraud, and to have ratified the subscription contract. A subscriber who for three years was an active director cannot rescind on the ground that fraudulent representations were made to him, nor can other subscribers rescind who subscribed through him as agent.² Where the subscriber, after discovering the fraud, serves as a director for two months and sues the president personally for the fraud, he cannot rescind as to the purchase.³ But mere attendance at a stockholders' meeting is insufficient.⁴

§ 161. *Laches as a bar to the subscriber's remedies.*—Where a subscriber for stock, who was induced to subscribe by fraud, neglects for an unreasonable time after the discovery of the fraud to have his subscription canceled, and, in the meantime, the interests of third persons become involved, and would be injured by the cancellation of such subscription, the subscriber's

which he was induced fraudulently to purchase from the corporation, even though he became and remained cashier for the corporation for over a year after the sale and before he set up the defense, and was a director and voted the stock. He did not necessarily learn the facts from occupying these positions, nor from the fact that he made official reports of the condition of the company. He was not bound to investigate. He tendered the stock back as soon as he discovered the facts. Especially do these rules apply where no creditors or other stockholders' rights have intervened. *National Bank v. Taylor*, 5 S. D. 99 (1894). A person cannot rescind for fraud a purchase of stock from the corporation itself, where, subsequently to discovering the fraud, he attended a stockholders' meeting, and voted to assess the stock, and afterwards attended another stockholders' meeting and paid the assessment. *Marten v. Paul, etc. Co.*, 99 Cal. 355 (1893). See also § 356, *infra*.

¹ *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859); *Chubb v. Upton*, 95 U. S.

665 (1877); *Litchfield Bank v. Church*, 29 Conn. 137 (1860); *Centre, etc. Turnp. Co. v. McConaby*, 16 Serg. & R. (Pa.) 140 (1827); *Mixer's Case*, 4 De G. & J. 575 (1859). Waiver of one misrepresentation is not a waiver of others. *Ex parte Hale*, 55 L. T. Rep. 670 (1886). The question of whether the subscriber has been guilty of laches may be submitted to the jury. *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135 (1896). Where a party is induced to subscribe by fraud and gives a note in payment, he can defend against the note on that ground, even though two months have elapsed since he discovered the fraud. He does not waive fraud by the fact that he united with others to buy the company's property. *Zang v. Adams*, 23 Colo. 408 (1897).

² *American, etc. Assoc. v. Rainbolt*, 48 Neb. 434 (1896).

³ *Lear v. Paige, etc. Co.*, 42 S. W. Rep. 808 (Tenn., 1897).

⁴ *Stewart's Case*, L. R. 1 Ch. App. 574 (1866); *Wontner v. Shairp*, 4 C. B. 404 (1847); *Re Metropolitan, etc. Assoc.*, 64 L. T. Rep. 561 (1891).

laches is a bar to relief, and a court of equity will refuse to set aside the subscription.¹ Equity does not allow the subscriber to say, "I will abide by the company if successful, and I will leave the company if it fails."² Immediately upon receiving information of the fraud, it is his duty to decide whether he will rescind the contract or waive the fraud.³ Nevertheless delay is not fatal, unless circumstances and third parties' rights have so changed or been acquired that the rescission would be inequitable. Consequently, the decision of each case depends largely on the facts of the case. Thus, it has been held that a delay of one,⁴ three,⁵ four,⁶ or six months,⁷ or of two,⁸ three,⁹ or six¹⁰ years, was fatal under the circumstances of the case, while, under different facts, a delay of two months,¹¹ or even seven years,¹² was held not to be a bar. In the remedies by actions at

¹ *City Bank v. Bartlett*, 71 Ga. 797 (1883). Such delay is also a bar in an action at law. *Schanck v. Morris*, 7 Rob. (N. Y.) 658 (1868). But it is no bar that other subscribers may have been induced to subscribe by reason of this subscription. *Western Bank v. Addie*, L. R. 1 Sc. App. Cas. 145 (1867). Cf. *Parbury's Case*, 3 De G. & Sm. 43 (1849).

² *Ashley's Case*, L. R. 9 Eq. 263 (1870); *Re London, etc. F. Ins. Co.*, L. R. 24 Ch. D. 149 (1883). See also § 356, *infra*.

³ *Philadelphia, etc. R. R. v. Cowell*, 28 Pa. St. 329 (1857), where there was a delay of seven years; *Heymann v. European Central R'y*, L. R. 7 Eq. 154 (1868); *Peek v. Gurney*, L. R. 6 H. L. 377 (1873). The last case overrules *Bagshaw v. Seymour*, 18 C. B. 903 (1856), and *Bedford v. Bagshaw*, 4 H. & N. 538 (1859).

⁴ *Taite's Case*, L. R. 3 Eq. 795 (1867), the delay evidently being to see which course would be most profitable.

⁵ *Heymann v. European Central R'y*, L. R. 7 Eq. 154 (1868).

⁶ *Ex parte Lawrence*, 36 L. J. (Ch.) 490 (1867); S. C., L. R. 2 Ch. App. 412.

⁷ *Whitehouse's Case*, L. R. 3 Eq. 790 (1867).

⁸ *Farrar v. Walker*, 3 Dill. 506, n. (1875); S. C., 8 Fed. Cas. 1076; *Ashley's Case*, L. R. 9 Eq. 263 (1870); *Peel's Case*, L. R. 2 Ch. App. 674 (1867); *Kincaid's Case*, L. R. 2 Ch. App. 420 (1867); *Wilkinson's Case*, L. R. 2 Ch. App. 536 (1867).

⁹ *State v. Jefferson Turnp. Co.*, 3 Humph. (Tenn.) 305 (1842).

¹⁰ *Denton v. Macneil*, L. R. 2 Eq. 352 (1866). Four years' delay in complaining of the fraud inducing the purchase, after knowledge thereof, is fatal. *Cedar Rapids Ins. Co. v. Butler*, 83 Iowa, 124 (1891). Where one stockholder who has been fraudulently induced to subscribe for stock awaits the result of an action by another stockholder brought to rescind his subscription on the same ground, the delay being nearly three years, and then commences suit for the same purpose only after a meeting has been called for a winding up, he is guilty of laches, and his remedy is barred. *Re Snyder, etc. Co.*, 68 L. T. Rep. 210 (1893).

¹¹ *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99 (1867).

¹² *McClellan v. Scott*, 24 Wis. 81 (1869).

law the statute of limitations governs, and, by analogy, courts of equity are inclined to follow the same period, unless there be an equitable reason to the contrary.

§ 162. The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. Mere suspicions or random statements heard in public or in stockholders' meetings do not necessarily constitute notice.¹ But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once.² The corporation has the burden of proof in asserting that the subscriber had notice and was guilty of laches.³ The House of Lords in England has recently held that where a subscriber sets up fraud as a defense to an action for calls, he need not show repudiation since he discovered the fraud. On the contrary, the company must show that he adhered to the contract after his knowledge of the fraud.⁴

§ 163. *Corporate insolvency as a bar to the subscriber's remedies.*—In England the principle has become well established that, after the statutory proceedings for winding up a corporation by reason of corporate insolvency have been commenced, a subscriber cannot rescind his subscription on account of fraud.⁵ He is too late. It matters not that he did not discover the fraud until after the winding up has commenced. The rights of corporate creditors prevail, then, over the equities of the subscriber.⁶ If, however, he instituted proceedings to rescind the

¹ *Venezuela Central R'y v. Kisch*, L. R. 2 H. L. App. 99 (1867).

² *Ogilvie v. Currie*, 37 L. J. (Ch.) 541 (1867); *Ashley's Case*, L. R. 9 Eq. 263 (1870); *Bosley v. National Machine Co.*, 123 N. Y. 550 (1890).

³ Quoted and approved in *Virginia Land Co. v. Haupt*, 90 Va. 533 (1894); *Re London, etc. Ins. Co.*, L. R. 24 Ch. D. 149 (1883).

⁴ *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

⁵ *Wright's Case*, L. R. 12 Eq. 331 (1871); *Kent v. Freehold, etc. Co.*, L. R. 3 Ch. App. 493 (1868); *Henderson v. Royal British Bank*, 7 El. & Bl. 356 (1857); *Powis v. Harding*, 1 C. B. (N. S.) 533 (1857); *Daniell v. Royal*

British Bank, 1 Hurlst. & N. 681 (1857); *Oakes v. Turquand*, L. R. 2 H. L. App. 325 (1867); *Mixer's Case*, 4 De G. & J. 575 (1859); *Clarke v. Dickson*, 27 L. J. (Q. B.) 223 (1858). So, also, where there is a voluntary winding up by reason of corporate insolvency. *Stone v. City, etc. Bank*, L. R. 3 C. P. D. 282 (1877); *Collins v. City, etc. Bank*, L. R. 3 C. P. D. 289 (1877). But not if the proceedings for rescission were commenced in good faith and in ignorance of the winding-up proceedings. *Hall v. Old Talargoch Min. Co.*, L. R. 3 Ch. D. 749 (1876).

⁶ *Turner v. Grangers', etc. Ins. Co.*, 65 Ga. 649 (1880).

contract before the winding up was commenced, he may be released, although the proceedings are not completed until after such winding up.¹ So, also, where there are several similar cases, and by agreement with the corporate solicitors all the cases are to follow a test case, this agreement prevails, although a winding up is commenced before the test case is fully decided.² The highest court in England in one case goes further, and intimates that corporate insolvency is a bar to rescission of a subscription for fraud, even though a winding up has not been commenced.³

§ 164. In this country the effect of corporate insolvency upon the right of a subscriber to rescind his contract for fraud has not been passed upon so often as in England. The decisions, however, clearly hold that corporate insolvency is generally a bar to such rescission.⁴ In the bankruptcy courts also, under the late bankruptcy law, such a rule was upheld.⁵ Neverthe-

¹ *Reese River, etc. Co. v. Smith*, L. R. 4 H. L. 64 (1869); affirming L. R. 2 Ch. 604; L. R. 2 Eq. 264; reversing 36 L. J. (Ch.) 385. A subscriber is liable on a winding up although he had repudiated the subscription long before on the ground of fraud, and understood that his name had been dropped. *Re Lennox Publishing Co.*, 62 L. T. Rep. 791 (1890). If the party institutes legal proceedings to cancel his subscription on the ground of fraud, prior to the commencement of the winding-up proceedings, the insolvency of the company is no bar. *Cocksedge v. Metropolitan, etc. Assoc.*, 64 L. T. Rep. 826 (1891).

² *Pawle's Case*, L. R. 4 Ch. App. 497 (1869); *McNiell's Case*, L. R. 10 Eq. 503 (1870). But mere attendance at the meeting where such stipulation is made is insufficient. The subscriber must plainly indicate an intention to abide by the test case. *Ashley's Case*, L. R. 9 Eq. 263 (1870).

³ *Tennent v. City of Glasgow Bank*, L. R. 4 App. Cas. 615 (1879). See also

Burgess's Case, L. R. 15 Ch. D. 507 (1880). But the fact that the company is unable to meet its engagements at the time of rescission is no bar if the subscriber is ignorant thereof. *Ex parte Carling*, 56 L. T. Rep. 115 (1887).

⁴ Approved in *Howard v. Turner*, 155 Pa. St. 349 (1893), holding that after the corporation has become insolvent and a receiver appointed, it is too late for a party to avoid his subscription on the ground of fraud. Fraud on the part of the officers in inducing the purchase is no defense to the statutory liability after the company becomes insolvent and passes into a receiver's hands. *Bissell v. Heath*, 98 Mich. 472 (1894). After insolvency it is too late to rescind. *Olson v. State Bank*, 69 N. W. Rep. 904 (Minn., 1897). Delay in rescinding for a year and a half, with knowledge, is fatal where the corporation has become insolvent in the meantime. *Hilliard v. Allegheny, etc. Co.*, 173 Pa. St. 1 (1896). It is too late after proceed-

⁵ *Farrar v. Walker*, 13 Nat. Bankr. Reg. 82 (1875); S. C., 8 Fed. Cas. 1076; *Michener v. Payson*, 13 Nat. Bankr. Reg. 49 (1875); S. C., 17 Fed. Cas. 259.

less, there are strong American cases to the effect that the insolvency of the corporation and the appointment of a receiver do not always bar the right of a subscriber to rescind his subscription on the ground of fraudulent representations.¹ And

ings to wind up have been commenced, the court holding, however, that in the case at bar the defendant might easily have discovered the fraud prior to the insolvency. *Ross, etc. Co. v. Southern, etc. Co.*, 72 Fed. Rep. 957 (1896). After the company becomes insolvent, and two and a half years have elapsed since the subscription, and during this time the means of discovering the fraud were open to the subscriber, the subscriber cannot rescind for fraud. *Martin v. South, etc. Co.*, 26 S. E. Rep. 591 (Va., 1897); *Ruggles v. Brock*, 6 Hun, 164 (1875); *Saffold v. Barnes*, 39 Miss. 399 (1860). After the corporation becomes insolvent a subscriber cannot repudiate for fraud. *Duffield v. Barnum, etc. Works*, 64 Mich. 293 (1887). In *Chubb v. Upton*, 95 U. S. 665, 667 (1877), the court says it has often been held that the defense of false and fraudulent representations will not prevail against a receiver, especially where there has not been a prompt discovery of the fraud, followed by a repudiation; citing *Upton v. Tribilcock*, 91 U. S. 45 (1875); *Webster v. Upton*, 91 U. S. 65 (1875); *Sanger v. Upton*, 91 U. S. 56 (1875); *Ogilvie v. Knox Ins. Co.*, 23 How. 380 (1859). *Cf. Litchfield Bank v. Peck*, 29 Conn. 384 (1860). Fraud is no defense as against creditors. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892); *McDowall v. Sheehan*, 13 N. Y. Supp. 386 (1891). Nor after insolvency. *Howard v. Glenn*, 85 Ga. 238 (1890). See also § 261, *infra*. An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not so applied; but the receiver will not be directed to give up the money.

Moore v. Robertson, 25 Abb. N. Cas. 173 (1890).

¹*Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135 (1896), aff'g *Newbegin v. Newton Nat. Bank*, 66 Fed. Rep. 701, where the subscriber subscribed in May, 1890, and the bank failed in November, and the subscriber at once instituted proceedings for rescission, and in May, 1891, filed a bill for that purpose and then withdrew the suit on a proposed reorganization, and then in November, 1891, started the suit again, and in December, 1892, the bank failed again. The court held that the suit might succeed, the subscriber not having taken any part in the management and having been a non-resident, and no large corporate indebtedness having been incurred in the meantime. 86 Fed. Rep. 553.

Where a subscriber subscribes in August, discovers the fraudulent misrepresentations in November, serves notice on the company in January that he repudiates the subscription, an action in behalf of corporate creditors against him to collect fails, the company having assigned in April. *Savage v. Bartlett*, 78 Md. 561 (1894); *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313 (1893), holding that even after insolvency the subscription may be repudiated for fraud.

Even after corporate insolvency fraud is a defense to an action on a subscription, where there is no proof that any debts were incurred by the corporation after such subscription was made. *Beal v. Dillon*, 47 Pac. Rep. 317 (Kan., 1896). Even after a receiver is appointed of a bank, a person who was induced to buy stock of the bank by fraudulent statements that the stock was worth par can re-

even after the corporation passes into an assignee's hands, a stockholder fraudulently induced by the president to take stock by misrepresentations as to the condition of the company may sue the company for damages and join the assignee.¹

§ 165. *Essential allegations in legal proceedings to remedy a fraud inducing subscription.*—The essential allegations, especially in a suit in equity, necessarily vary according to the peculiar facts of each case. Yet there are certain elements common to all the cases. It is necessary to allege that a material misrepresentation of a question of fact was made, setting out fully the fact misrepresented; that the person making the misrepresentation thereby bound the corporation; and that, upon discovery of the fraud, he immediately disaffirmed the contract.² That the representation was false cannot be proved by statements made by the directors in stockholders' meetings.³ The burden of proving that the representation was false, and that the subscriber relied thereon, is upon the subscriber.⁴

scind by suit. *Robinson v. Dicker*, 36 S. W. Rep. 499 (Tex., 1896).

¹ *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545 (1894).

² Quoted and approved in *Armstrong v. Karshner*, 47 Ohio St. 276 (1890); *Bwlch-y-plwm L. M. Co. v. Baynes*, 36 L. J. (Ex.) 183 (1867); *Deposit, etc. Co. v. Ayscough*, 6 El. & B. 761 (1856); *Upton v. Englehart*, 3 Dill. 496 (1874); S. C., 28 Fed. Cas. 835; *Hallows v. Fernie*, L. R. 3 Ch. App. 467 (1868); *Selma, etc. R. R. v. Anderson*, 51 Miss. 829 (1876),—the last case holding it necessary to allege also that the fact misrepresented was not a charter matter. *Carey v. Cincinnati*, etc. R. R., 5 Iowa, 357 (1857), indicates that an allegation that the certificates are brought into court for disposal is proper. See also *Oregon Cent. R. R. v. Scoggin*, 3 Oreg. 161 (1869); *Gillfillan v. Mawhinney*, 149 Mass. 264 (1889).

³ *Re Devala, etc. Co.*, L. R. 22 Ch. D. 593 (1883). Cf. *Philadelphia, etc. R. R. v. Quigley*, 21 How. 202 (1858). *Contra*, *Jarrett v. Kennedy*, 6 C. B. 319 (1848).

⁴ *Jennings v. Broughton*, 22 L. J. (Ch.) 585 (1853). A subscription will not be decreed to be canceled unless the proof of fraudulent representations is very clear, especially where the subscription contained special terms in writing. *Wenstrom, etc. Co. v. Furnell*, 23 Atl. Rep. 134 (Md., 1891). In New York, proof of other similar contemporaneous frauds is admissible. *Miller v. Barber*, 66 N. Y. 558 (1876). In Alabama it is not admissible. *Montgomery Southern R'y v. Matthews*, 77 Ala. 357 (1884). Fraudulent representations to others made about the same time are not admissible as evidence. *Roche v. Coleman*, 42 S. W. Rep. 739 (Ky., 1897); *Johnson v. Gulick*, 46 Neb. 817 (1896).

CHAPTER X.

MISCELLANEOUS DEFENSES TO SUBSCRIPTIONS FOR CAPITAL STOCK.

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| <p>§ 166. Defenses to subscriptions not favored by the courts.</p> <p>167-170. Release, withdrawal, cancellation, or rescission.</p> <p>171. Compromise.</p> <p>172-175. Non-payment of percentage required by statute.</p> <p>176-181. Full capital stock not subscribed.</p> <p>182. Capital stock not definitely resolved upon.</p> <p>183-186. Irregular incorporation.</p> <p>187. <i>Ultra vires</i> acts.</p> <p>188. Fraud and mismanagement of directors.</p> | <p>§ 189. Delay and abandonment of enterprise.</p> <p>190. Failure of corporate enterprise.</p> <p>191. Secret agreement as to liability — Other subscribers released.</p> <p>192. No certificates of stock issued.</p> <p>193, 194. Set-off and counter-claim.</p> <p>195. Statute of limitations.</p> <p>196. Ignorance or mistake.</p> <p>197. Miscellaneous defenses — Change in the contract.</p> <p>198. Waiver of defenses.</p> |
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§ 166. *Defenses to subscriptions not favored by the courts.*— It is a common saying and a well-recognized fact that the subscribers to certain corporate enterprises, especially railroads, rarely realize a profit from their investment, but, on the contrary, lose the whole amount of the subscription which they have made. These subscriptions are generally not called in until after corporate insolvency has occurred. Then the reluctance of the subscriber to pay a subscription from which there is no hope of a return leads him to search out and build up all possible defenses to defeat any action for the collection of the amount due from him. Some of these defenses are just, and have been sustained; but most of them have not been allowed. On the theory that, having taken the chances of large gains, the subscriber takes also the risk of total loss, and that the hardship of the subscriber is not equal to the superior equities and rights of corporate creditors, the courts have uniformly discountenanced such defenses, and have rigidly enforced the subscriber's liability.

§ 167. *Release, withdrawal, surrender, cancellation, or rescission.*— These terms are frequently used as synonymous, although technically they have different meanings. The term *release*, especially, has led to considerable confusion. It has

been applied to cases where the subscriber withdraws his offer to subscribe, the contract not yet having been closed;¹ second, to cases where the subscriber retains his stock, but is not required to pay the full par value thereof; third, to cases where the subscription contract is dissolved by mutual agreement. The last class of cases forms the subject of this section. The term *rescission* is more properly applied to the defense of fraudulent representations.² Probably the term *cancellation* describes most accurately the dissolution of a subscription contract by the mutual consent of all parties concerned.³

§ 168. A subscription contract, like any other contract, may be waived, canceled, or dissolved by the mutual consent of all the parties interested. The interested parties are the subscriber himself, the other stockholders, and the corporate creditors existing at the time of the cancellation. Frequently the directors of the corporation attempt to usurp this right and power of the general stockholders. The well-established rule, however, is that corporate directors have no power to agree with a subscriber that his subscription shall be canceled, unless such power is given to them by charter or statute or the by-laws of the corporation.⁴ The cancellation of a subscription differs little from

¹For this class of cases see §§ 56, 72, 84, *supra*.

²See ch. IX.

³For a definition of the words "surrender" and "cancellation," see Green's Brice's *Ultra Vires* (2d ed.), 181, 189; *Re Dronfield, etc. Co.*, L. R. 17 Ch. D. 76 (1880); *Colville's Case*, 48 L. J. (Ch.) 633 (1879). Cancellation cannot be objected to on the ground that it reduces the capital stock. It no more reduces the capital stock than a forfeiture does. *Re Dronfield, etc. Co.*, L. R. 17 Ch. D. 76 (1880).

⁴In the case of *Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864), where, just before the expiration of their office, the directors fraudulently released part of the subscribers, the court said: "It is an abuse of their trust, wholly unauthorized, and at war with the design of the charter, to single out some of the stock subscribers and release them from their

liability. No such authority in them has ever been recognized." The directors have no power to release a subscriber nor to allow him to make additional conditions to his subscription. *La Fayette, etc. Corp. v. Ryland*, 80 Wis. 29 (1891). To the same effect, *Rider v. Morrison*, 54 Md. 429 (1880); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Ryder v. Alton, etc. R. R.*, 13 Ill. 516 (1851); *Tuckerman v. Brown*, 33 N. Y. 297 (1865); *Re Esparto Trading Co.*, L. R. 12 Ch. D. 191 (1879); *Re United Service Co.*, L. R. 5 Ch. App. 707 (1870); *Re London, etc. Coal Co.*, L. R. 5 Ch. D. 525 (1877); *Re Argyle, etc. Co.*, 54 L. T. Rep. 233 (1885); *Ex parte Fletcher*, 37 L. J. (Ch.) 49 (1867); *Addison's Case*, L. R. 5 Ch. 294 (1870); *Spackman v. Evans*, L. R. 3 H. L. 171 (1868). But see *Thomas's Case*, L. R. 13 Eq. 437 (1872), where the directors had power to "enter into, alter, rescind, or aban-

a purchase by the corporation of shares of its own stock. The rules of law governing such a transaction are laid down elsewhere.¹

don contracts;" *Richmond's Case*, 4 K. & J. 305 (1858), holding that power to forfeit does not give power to cancel; *Adams's Case*, L. R. 13 Eq. 474 (1872), holding that power to compromise gives no power to cancel, the vice-chancellor saying: "It would be putting into the hands of directors an almost unlimited power. . . . It might happen in cases where it would be impossible to fix fraud on them." A cancellation of shares is void, and the subscriber is liable, though ten years have elapsed. *Re Argyle, etc. Co.*, 54 L. T. Rep. 233 (1885). *Cf. Plate Glass Univ. Ins. Co. v. Sunley*, 8 El. & Bl. 47 (1857); *Kollman's, etc. Co. v. Beresford*, 2 Macn. & G. 197 (1850); *Lord Belhaven's Case*, 34 L. J. (Ch.) 503 (1865); *Ex parte Blake*, 34 L. J. (Ch.) 278 (1865); *Fox's Case*, L. R. 5 Eq. 118 (1868); *Dixon's Case*, L. R. 5 Ch. App. 79 (1869), *rev'd* on another point, L. R. 5 H. L. 606 (1872); *Burt v. Farrar*, 24 Barb. 518 (1857); *Gregory v. Lamb*, 16 Neb. 205 (1884); *Ersine v. Peck*, 83 Mo. 465 (1884). See also § 153.

The directors may release a subscription payable in property, part of which has been delivered. *Nettles v. Marco*, 33 S. C. 47 (1890). Before organization a subscriber probably can be released by the promoters and his subscription canceled, but after organization the officers have no power to release him and take other subscriptions in his stead. Nothing but a transfer is then available. The officers cannot repay to him the amount paid in by him. He is and

remains liable. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). A subscription which has been fraudulently obtained may be canceled by the directors, and, after four years' acquiescence by the corporation, corporate creditors cannot attack it. *McDermott v. Harrison*, 9 N. Y. Supp. 184 (1890). The express power of the directors to do all things "conducive to the attainment of the objects" for which it was established does not enable them to agree to a cancellation. *Re Dronfield, etc. Co.*, L. R. 17 Ch. D. 76 (1880). As against corporate creditors a subscription cannot be canceled, although the work in which the subscription is due can no longer be done. *Wheatcroft's Case*, 29 L. T. 324 (1873). Sometimes the directors agree in advance to release or cancel a part or all of the subscriber's contract. Such agreements are void, not only as *ultra vires*, but as frauds on other subscribers. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446 (1875); *Robinson v. Pittsburgh, etc. R. R.*, 32 Pa. St. 334 (1858); *Minor v. Mechanics' Bank*, 1 Pet. 46, 65 (1828); *Jewett v. Valley R'y*, 34 Ohio St. 601 (1878); *White Mountains R. R. v. Eastman*, 34 N. H. 124 (1856). See also *Pickering v. Templeton*, 2 Mo. App. 425 (1876); *Downie v. White*, 12 Wis. 176 (1860); *Blodgett v. Morrill*, 20 Vt. 509 (1848); *Davidson's Case*, 3 De G. & S. 21 (1849); *Bridger's Case*, L. R. 9 Eq. 74 (1869); *Litchfield Bank v. Church*, 29 Conn. 137 (1860). Where, however, the issue itself is *ultra vires*, being fictitious paid-up stock, the directors may agree

¹ See §§ 251, 309, 310, etc., *infra*. A plan whereby the corporation takes back the stock and issues certificates of indebtedness for it is invalid as

against creditors. The latter are entitled to the assets in preference to the former. *Heggie v. People's Building, etc. Assoc.*, 107 N. C. 581 (1890).

Where a person owns partly paid-up stock, the company may agree that the amount already paid shall be applied on a part of the stock, thereby making that part fully paid-up stock. A transferee of such paid-up stock is not liable thereon, even though he took title with full knowledge of the facts.¹

§ 169. A subscriber for stock in a corporation cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers.² Even a majority of the stock-

to a cancellation. *Barnett's Case*, L. R. 18 Eq. 507 (1874). Or an *ultra vires* stock dividend. *Hollingshead v. Woodward*, 35 Hun, 410 (1885). They may cancel it for mistake in registering the wrong person. *Ex parte Keightley*, 9 Weekly Notes, 18, 47 (1874). See *Hartley's Case*, L. R. 10 Ch. 157 (1875). The agreement of a stockholder to surrender his stock in liquidation of an unpaid assessment is without consideration and does not bind a purchaser of the certificate. *Hill v. Atoka Coal Co.*, 21 S. W. Rep. 508 (Mo., 1893). The secretary cannot accept a surrender and cancellation of the subscription. *Minnehaha, etc. Assoc. v. Legg*, 50 Minn. 333 (1892). In England an express power given by the articles of association of the corporation may authorize cancellation by the directors. *Colville's Case*, 48 L. J. (Ch.) 633 (1879); *Snell's Case*, L. R. 5 Ch. 22 (1869); *Wright's Case*, L. R. 12 Eq. 331 (1871), reversed in L. R. 7 Ch. App. 55 (1871); *Teasdale's Case*, L. R. 9 Ch. 54 (1873); *Whiteley's Case*, 60 L. T. Rep. 807 (1889). *Healey, Companies' Law & Pr.* (3d Eng. ed.), p. 110, says: "There is no inherent power in directors to accept a surrender of shares, nor is the acceptance of a surrender a matter lying between the majority and minority. Every shareholder must expressly . . . or impliedly join in the release; though a company may be precluded by knowledge and acquiescence from disputing the validity of the surrender." Citing many cases,

and discussing what constitutes notice and acquiescence.

¹*Neelon v. Thorold*, 22 S. C. of Canada, 390 (1893), rev'g 18 App. R. 658, and aff'g 20 O. R. 86. Where calls to the amount of fifty per cent have been paid, the president cannot agree with a stockholder that he should be released from one-half of his subscription and take full-paid stock for the remainder. *Fuches v. Hamilton, etc. Co.*, 10 Ont. (Can.) 497 (1886). A subscriber for \$1,000 of stock who pays in \$200, being twenty per cent, and then transfers \$200 of full-paid stock to another, is still liable for the remaining \$800. It is immaterial that the old certificates, showing that twenty per cent had been paid, were returned to the corporation, and only \$200 of stock re-issued. This does not amount to a reduction of the stock to twenty per cent. *Putnam v. Hutchison*, 4 Kan. App. 273 (1896). It is legal for a corporation, by common consent, to issue to its stockholders full-paid stock to the amount of cash actually paid in on a larger subscription, the first subscription being canceled; such arrangement being made before debts are incurred. *Hill v. Silvey*, 81 Ga. 500 (1889).

²*Kidwelly Canal Co. v. Raby*, 2 Price, 93 (1816); *Lake Ontario, etc. R. v. Mason*, 16 N. Y. 451, 463 (1857); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316 (1870); *Johnson v. Wabash, etc. Co.*, 16 Ind. 389 (1861); *United Soc. v. Eagle Bank*, 7 Conn. 456 (1829); *Bishop's Fund v. Eagle Bank*, 7 Conn.

holders cannot withdraw and refuse to proceed.¹ These rules are just, and based upon a sound public policy. By unanimous consent of the stockholders a subscription may be canceled, and a subsequent creditor of the corporation cannot complain.² A subscriber may withdraw from his subscription if the withdrawal is prior to the incorporation. Notice of the withdrawal may be verbal, and may be given to the chief party in the enterprise, who afterwards is made president.³

476 (1829); *Selma, etc. R. R. v. Tipton*, 5 Ala. (N. S.) 787 (1843). A subscription for capital stock of a corporation cannot be canceled without the consent of all the stockholders, except for fraud or mistake. *Pacific Fruit Co. v. Coon*, 107 Cal. 447 (1895). Where a person subscribes for stock, and then an oral arrangement is made with the other stockholders, by which the former is to be released and the latter are to carry on the business, and the latter then sell their stock after assigning to one of their number certain corporate assets, including the subscription above named, such subscription cannot be enforced. *Cusick v. Bartlett*, 39 Atl. Rep. 497 (Me., 1898). Where there are only five stockholders and no creditors, and no business has been done, the five may release each other from their subscriptions, and one of them who subsequently obtains control of the association cannot cause the corporation to enforce such subscriptions. *Non-Electric, etc. Co. v. Peabody*, 21 N. Y. App. Div. 247 (1897). The plea in defense need not allege that the other stockholders assented to the cancellation. *Gelpcke v. Blake*, 19 Iowa, 263 (1865). Where, however, by the articles of association, acts of the directors ratified at stockholders' meetings were to be valid, a cancellation so ratified is legal, and the unanimous consent is not necessary. *Marshall v. Glamorgan, etc. Coal Co.*, L. R. 7 Eq. 129 (1868). A corporation is bound by the agreement of its

agent that a person taking stock in the corporation and giving his note in payment may return the stock at any time and be released from payment. *Bank of Lyons v. Demmon, Hill & D. Supp.* (N. Y.) 398 (1844). Where property is sold to a corporation for stock, and other stockholders are dissatisfied, the bargain may be rescinded. The stockholder will then no longer be liable. *Morgan v. Lewis*, 46 Ohio St. 1 (1888). Cancellation is a question of fact. If there is no record of it, and the stockholder continues to act, he is bound. *Topeka Mfg. Co. v. Hale*, 39 Kan. 23 (1888). An offer or agreement to subscribe is revoked by death, where it has not yet been accepted by the corporation. *Wallace v. Townsend*, 43 Ohio St. 537 (1885); *Sedalia, etc. R'y v. Wilkerson*, 83 Mo. 235 (1884). The company may be compelled to issue a certificate to one who acquires his interest by the death of the original subscriber. *State v. Crescent City, etc. Co.*, 24 La. Ann. 318 (1872). Although the directors cannot, yet the stockholders, by unanimous consent, may allow subscriptions to be reduced one-half by cancellation of one-half, creditors' rights not intervening. *Glenn v. Hatchett*, 91 Ala. 316 (1890).

¹ *Bussey v. Hooper*, 35 Md. 15 (1871).

² *Shoemaker v. Washburn, etc. Co.*, 73 N. W. Rep. 333 (Wis., 1897).

³ *Hudson Real Estate Co. v. Tower*, 161 Mass. 10 (1894). A subscription prior to organization may be withdrawn at any time prior to organiza-

The consent of all the other stockholders, however, need not be express. If the means of notice are sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for many years, no objection can be made. The stockholders are bound by the cancellation.¹ But where a subscription has been canceled, and calls already paid are refunded without the consent of the other stockholders, any stockholder may, by a bill in equity, have the money refunded to the corporation, and the subscriber made liable upon his canceled subscription.² Moreover, the directors are personally liable to the corporation for loss occasioned by

tion and acceptance. *Bryant's, etc. Co. v. Felt*, 87 Me. 234 (1895). The agreement of a creditor of a corporation to take stock in a proposed re-organized company may be revoked by the creditor at any time before actual performance. *Providence, etc. Co. v. Kent, etc. Co.*, 35 Atl. Rep. 152 (R. I., 1896). A person may withdraw from a voluntary subscription at any time before the full amount is subscribed or liabilities incurred or the organization perfected. *Lewis v. Hillsboro, etc. Co.*, 23 S. W. Rep. 338 (Tex., 1893). A subscriber to stock may withdraw his subscription before the organization thereof, before the expenditure of any money, and with the consent of the payee. *Patty v. Hillsboro, etc. Co.*, 4 Tex. Civ. App. 224 (1893). An underwriter cannot withdraw where the party to whom he gave the power to underwrite for him had an interest in the contract being carried out. *Re Hannan's, etc. Co.*, 74 L. T. Rep. 550 (1896). A subscriber may withdraw at any time prior to the filing of the articles of incorporation. *Auburn, etc. Works v. Shultz*, 143 Pa. St. 256 (1891); *Hudson Real Estate Co. v. Tower*, 156 Mass. 82 (1892); *Garrett v. Dillsburg, etc. R. R.*, 78 Pa. St. 465 (1875). Prior to incorporation a subscriber may withdraw, especially if his subscription was informal and was merely to see what

could be done. *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182 (1891). In Pennsylvania a subscriber for stock may withdraw at any time before the charter is applied for. *Muncy, etc. Co. v. De La Green*, 13 Atl. Rep. 747 (Pa., 1888); *Cook v. Chittenden*, 25 Fed. Rep. 544 (1885), allowing a withdrawal where no others have subscribed in reliance thereon, nor creditors' debts incurred; *Gulf, etc. R'y v. Neely*, 64 Tex. 344 (1885), holding that there can be no withdrawal after an acceptance by the corporation. *Cf. Tilsenburgh, etc. Co. v. Goodrich*, 8 Ontario (Q. B. D.), 565 (1885); *Rose v. San Antonio, etc. R. R.*, 31 Tex. 49 (1868); *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451, 463 (1857). See also *Gaff v. Flesher*, 33 Ohio St. 107 (1877).

¹ *Evans v. Smallcombe*, L. R. 3 H. L. 249 (1868). So also where the corporation retains the benefits of a cancellation, no objection can be made. *Miller v. Second, etc. Assoc.*, 50 Pa. St. 32 (1865). Proof of cancellation need not necessarily be by the corporate records; it may be proved by evidence that the subscriber "was not regarded by himself or by the company as a stockholder." *Stuart v. Valley R. R.*, 32 Gratt. (Va.) 146 (1879).

² *Melvin v. Lamar Ins. Co.*, 80 Ill. 446 (1875).

their improper cancellation of subscriptions.¹ When, however, a subscriber fails to pay his subscription or exercise his rights, it has been held that the corporation may take his subscription as abandoned and allow others to fill it.² An alteration, however, of the subscription list by substitution of different stockholders may release dissenting stockholders.³ Where a subscription is not paid, and the stock is transferred to the corporation as "treasury stock" and then sold below par, the purchaser is liable for the unpaid par value.⁴ Where a subscription for stock is paid, the stockholder is entitled to his stock and past dividends, although for thirty years he has slept on his rights.⁵

§ 170. A cancellation of a subscription, to the detriment of corporate creditors, may be impeached by the latter and set aside.⁶ Especially is this the rule when the cancellation is

¹ *Hodgkinson v. National, etc. Ins. Co.*, 26 Beav. 473 (1859); *Bank of St. Mary's v. St. John*, 25 Ala. 566 (1854). The subscriber, also, may set up this defense. *Southern Hotel Co. v. Newman*, 30 Mo. 118 (1860).

² *Perkins v. Union, etc. Co.*, 94 Mass. 273 (1866). Cancellation may be by the substitution of another person for the subscriber at the latter's request. This occurs where regular transfer is not yet possible. The signature of the first subscriber must be erased and that of his substitute inserted. Otherwise the substitution fails. *Ryder v. Alton, etc. R. R.*, 13 Ill. 516 (1851). And see § 62, *supra*.

³ See §§ 53, 62, *supra*.

⁴ *Alling v. Wenzel*, 133 Ill. 264 (1890).

⁵ Where, in 1845, an Indian chief disclosed an iron mine under promise of being compensated, and the officers of the unincorporated company gave him a paper recognizing his right to twelve thirty-one one-hundredths interest, and after incorporation in 1848 eighteen full-paid shares of stock were set aside for the Indians, and twelve of such shares correspond to the twelve thirty-one one-hundredths interest, the descendants of the chief are entitled to the stock although neither

he nor they made any claim thereto until 1877. Back profits may also be recovered. The statute of limitations is no bar. A new corporation assuming the property and liabilities of the old one is liable. *Kobogum v. Jackson Iron Co.*, 76 Mich. 498 (1889). To same effect, *Bedford County v. Nashville, etc. R. R.*, 14 Lea (Tenn.), 525 (1884).

⁶ One who is a corporate creditor before the cancellation is made may object to it. *Vick v. La Rochelle*, 57 Miss. 602 (1880); *Miller's Appeal*, 1 Pa. Sup. Ct. 120 (1881), in which stock in an insurance company was subscribed for in order to enable the company to undergo an examination by the commissioner, a dividend being paid on it during their holding, and the notes given in payment being published as assets. It was held that although, after the emergency had passed, the stock was taken back by the company and the notes canceled, the subscribers were liable to its creditors, the transaction being looked upon as a fraud upon them. Cancellation by withdrawal is not legal as against corporate creditors existing at the time of the withdrawal, even though all the stockholders assent thereto. *Farnsworth v.*

made after the corporation has become insolvent.¹ In the United States courts it is established that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing, and for a valuable consideration.²

Robbins, 36 Minn. 369 (1887). Where a corporation takes land in payment for stock, then rescinds, and twelve months afterwards becomes insolvent, and no complaint is made for sixteen months after the rescission, their action is binding. *Sanderson v. Ætna, etc. Co.*, 34 Ohio St. 442 (1879). So, also, if the debt was incurred after the cancellation. *Johnson v. Lullman*, 15 Mo. App. 55 (1884); *Ersine v. Peck*, 13 Mo. App. 280 (1883); *Winston v. Dorset Pipe, etc. Co.*, 129 Ill. 64 (1889). The plea in defense, it has been held, need not allege that there were no corporate creditors at the time of the cancellation. *Gelpcke v. Blake*, 19 Iowa, 263 (1865). In England a different rule prevails. "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders." *Re Dronfield, etc. Co.*, L. R. 17 Ch. D. 76 (1880). A *bona fide* cancellation of a subscription is valid, and corporate creditors cannot have it set aside. *Wangerien v. Aspell*, 47 Ohio St. 250 (1890). Where the directors rescind a subscription at the request of the subscriber, he cannot be made liable five years later. *Whiteley's Case*, 60 L. T. Rep. 807 (1889). Subscribers whose stock is taken back by the corporation are not liable thereon either at common law or by statute relative to transfers. *Aling v. Wenzel*, 133 Ill. 264 (1890). A fraudulent release by a corporation of an unpaid subscription to an increase in the capital stock of a corporation is void even against a debt arising before the increase. *Carter*

v. Union Printing Co., 54 Ark. 576 (1891). This case holds also that a corporate creditor may object to the corporation releasing a stockholder from his stock and repaying to him the subscription which he has paid in. The transaction may be set aside. It is legal for the corporation to make an agreement with stockholders whereby the latter surrender their stock upon which they have paid twenty per cent, and receive full-paid stock to the amount of twenty per cent of the stock surrendered. A receiver cannot attack this agreement even in behalf of creditors. *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150 (1890). The "trust fund" theory is denied in *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174 (1892). As against a corporate creditor, a subscriber for stock before incorporation cannot withdraw after incorporation, even with the consent of other stockholders. *Balfour v. Baker City Gas Co.*, 27 Oreg. 300 (1895). In *Harmon v. Hunt*, 116 N. C. 678 (1895), corporate creditors held subscribers liable, although the latter had been allowed to withdraw soon after the organization.

¹ *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286 (1881); *Gill v. Balis*, 72 Mo. 424 (1880), holding, also, that it is immaterial that enough subscriptions remain to pay the corporate debts.

² "The governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration."

§ 171. *Compromise*.—A compromise differs from a cancellation in that the subscriber pays to the corporation a part of the subscription price in order to be released from the balance. The stock is delivered back to the corporation. The corporate authorities—generally the directors—have power to compromise any corporate debt; and if, in the collection of subscriptions, there is reasonable doubt as to the liability of the subscriber,¹ or if the subscriber is insolvent, the corporation may compromise the liability and release a part for the purpose of securing the residue. All that is required is good faith.² It has been held that a receiver cannot compromise a subscription; nor can a court of equity give him power so to do, unless all the stockholders are parties to the equitable suit in connection with which the receiver is appointed.³ A compromise where there is no controversy is a misnomer. The case is then one of release and of the power of the directors or stockholders to make it.⁴

Potts v. Wallace, 146 U. S. 689 (1892); *Burke v. Smith*, 16 Wall. 390 (1872); *New Albany v. Burke*, 11 Wall. 96 (1870). So, also, in Illinois. See *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334 (1875). An arrangement by which a subscriber for stock paid the money into the treasury, and this money is then paid out for property, and the parties receiving the money then return it to the subscriber, is not valid. The subscriber is liable to pay over again. *Scales v. Irwin*, 34 Q. B. Rep. (Can.) 545 (1874). A corporation cannot give a mortgage to a subscriber as security for the amount paid in by the latter on his subscription for stock. *Boney v. Williams*, 38 Atl. Rep. 189 (N. J., 1897). In the case of *Brown v. St. Paul, etc. Works*, 63 Minn. 90 (1895), an agreement of a corporation with a subscriber for stock to take back the stock at a certain time and refund the money if the subscriber so wished was upheld.

¹ *Bath's Case*, L. R. 8 Ch. D. 334 (1878); *Belhaven's Case*, 3 De G., J. & S. 41 (1865). An unaccepted offer of compromise is no defense, and com-

promises with other stockholders are no defense. *Howard v. Glenn*, 85 Ga. 288 (1890).

² *Philadelphia, etc. R. R. v. Hickman*, 28 Pa. St. 318 (1857). Power may be given by statute. *Pearson's Case*, L. R. 7 Ch. 309 (1872), holding that, under the English statute, the court may allow, but cannot compel, a receiver to compromise. Where a stockholder denies his liability, and the directors compromise with him by reducing the amount of his subscription, the compromise is binding on all parties. *Whitaker v. Grummond*, 68 Mich. 249 (1888). The company may compromise, but cannot do so by canceling a part only of the subscription. *Livingstone v. Temperance, etc. Soc.*, 17 App. Rep. (Can.) 379 (1890).

³ *Chandler v. Brown*, 77 Ill. 333 (1875). The fact that the court authorized the receiver to compromise with some of the stockholders is no defense to others. *Hambleton v. Glenn*, 72 Md. 331 (1890).

⁴ *Phosphate, etc. Co. v. Green*, L. R. 7 C. P. 43 (1871); *Spackman v. Evans*,

§ 172. *Non-payment of a percentage required by statute.*—The charter or statute governing a corporation often prescribes that each subscriber to the capital stock shall, at the time of subscribing, pay to the corporation a fixed sum or a specified proportion of the subscription. These statutes vary somewhat in their provisions, some declaring the subscription to be void unless the percentage is paid, others merely prescribing that it shall be paid.

In the actual taking of the subscriptions it frequently happens that the subscriber has not the ready money requisite, and is allowed to subscribe without paying the same. When an attempt is made to collect such a subscription, the subscriber, if the enterprise has resulted disastrously, sets up the defense that he did not pay the statutory percentage, and that the subscription is void and not enforceable. A long list of cases, dating from the early litigation over railroads, has turned upon this defense. In some of the states the defense has been held insufficient; in others a contrary rule prevails; and in still others, first one rule and then the other has been adopted.

§ 173. The decided weight of authority and the most carefully considered cases hold that a subscriber for stock cannot escape the responsibilities of a stockholder by showing that he never paid the percentage or fixed amount required by the charter or statute to be paid at the time of subscribing.¹ He

L. R. 3 H. L. 171, 188, 231 (1868). In *Dixon v. Evans*, L. R. 5 H. L. 606 (1872), the subscription was made upon a condition, which remaining unfulfilled, a compromise was made permitting the withdrawal of the subscriber. *Held*, after two appeals, that directors had power to enter into such a compromise, and the subscriber was not held in the winding up.

¹Quoted and approved in *Union Water Co. v. Kean*, 52 N. J. Eq. 111 (1893); *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893); *Illinois River R. R. v. Zimmer*, 20 Ill. 654 (1858), holding that the commissioners may waive payment. The court said: "This indulgence is a most ungracious defense, which should not be allowed

unless it is strictly required by some inflexible rule of law;" *Haywood, etc. Co. v. Bryan*, 6 Jones, L. (N. C.) 82 (1858), the court saying: "It would be a strange rule which would allow him to take advantage of the other stockholders' forbearance and his own neglect;" *Pittsburgh, etc. R. R. v. Applegate*, 21 W. Va. 172 (1882), declaring that the statute is "to ensure good faith, and to avoid shams in enterprises that so vitally affect the public," but not to change the liability of stockholders to corporations; *Minnesota, etc. R'y v. Bassett*, 20 Minn. 535 (1874), where the court said of the statute: "While it confers upon plaintiff the right to insist upon the payment, it does not make the successful exercise of this right

will not thus be permitted to take advantage of his own wrong and default to the prejudice of others. In some instances the percentage was paid in notes¹ or checks² instead of cash; in others, payment in cash was made at some period subsequent

indispensable to the validity of the subscription;" *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655 (1876), where the requirement was provided for in the subscription itself; *Barrington v. Mississippi Cent. R. R.*, 32 Miss. 370 (1856), where payment was made before the subscription. See also *Vicksburg, etc. R. R. v. McKean*, 12 La. Ann. 638 (1857); *Bibb v. Hall*, 101 Ala. 79 (1893); *Albright v. Texas, etc. R. R.*, 42 Pac. Rep. 73 (New Mex., 1895); *Wright v. Shelby R. R.*, 16 B. Mon. (Ky.) 4 (1855); *Smith v. Tallassee Plank-road Co.*, 30 Ala. 650 (1857); *Mitchell v. Rome R. R.*, 17 Ga. 574 (1855); *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1848); *Chamberlain v. Painesville, etc. R. R.*, 15 Ohio St. 225 (1864); *Napier v. Poe*, 12 Ga. 170 (1852); *Fiser v. Mississippi, etc. R. R.*, 32 Miss. 359 (1856); *Ryder v. Alton, etc. R. R.*, 13 Ill. 516 (1851), where the subscriber was one of the commissioners; *Klein v. Alton, etc. R. R.*, 13 Ill. 514 (1851), where payment was made before the subscription books were closed; *Stuart v. Valley R. R.*, 32 Gratt. (Va.) 146 (1879); *Southern L. Ins. Co. v. Lanier*, 5 Fla. 110 (1853); *Selma, etc. R. R. v. Rountree*, 7 Ala. (N. S.) 670 (1845); *Spartanburg, etc. R. R. v. Ezell*, 14 S. C. 281 (1880), where a few subscribers paid in more than their percentage, and enough to make up for those not paying; *Oler v. Baltimore, etc. R. R.*, 41 Md. 583 (1874), where the percentage was "payable," the court saying that this merely made it "due and collectible," like a call. To the same effect, *Ashtabula, etc. R. R. v. Smith*, 15 Ohio St. 328

(1864). Payment by the subscriber's agent is sufficient. *Litchfield Bank v. Church*, 29 Conn. 137 (1860). The following cases hold that non-payment of the required percentage is a good defense: *Charlotte, etc. R. R. v. Blakely*, 3 Strobb. L. (S. C.) 245 (1848); *State Ins. Co. v. Redmond*, 1 McCrary, 308 (1880). The requirement herein was by by-law. *People v. Chambers*, 42 Cal. 201 (1871), holding a check to be insufficient; *Farmers', etc. Bank v. Nelson*, 12 Md. 35 (1857); *Taggart v. Western Md. R. R.*, 24 Md. 563, 588 (1866); *Wood v. Coosa, etc. R. R.*, 32 Ga. 273 (1861), the statute prescribing that the subscription should be "void." A provision that only ten per cent of the stock shall be paid up until certain contingencies arise is strictly construed by the courts. *Burlington v. Burlington Water Co.*, 86 Iowa, 266 (1892). Although the statute requires that a certain percentage of subscriptions shall be paid upon incorporation, yet one subscriber may pay the proportion of others. *Beattys v. Solon*, 64 Hun, 120 (1892). It is no defense that the corporation commenced business before twenty-five per cent of its capital stock had been paid in, as required by the charter. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403 (1890).

¹ *Vermont Cent. R. R. v. Claves*, 21 Vt. 30 (1848). A bond so given is collectible, as it would be if given to carry out a parol contract for the sale of land void by the statute of frauds. *McRae v. Russell*, 12 Ired. (N. C.) 224 (1851), the court saying that the statute was meant "to protect real stock-

² *People v. Stockton, etc. R. R.*, 45 Cal. 306 (1873), there being funds in the bank to meet it.

to the act of subscribing;¹ in still others, no payment at all was made on the subscription, and suit was brought for the whole amount.² Where the directors commence business before ten per cent of the capital is paid in as required by statute, the directors are personally liable as agents transacting business without authority from the principal.³ In England a failure to pay such a percentage is held not to affect the liability of the subscriber, but to restrict his right of transferring his stock.⁴

§ 174. In New York there has been doubt and a strong tendency to change the rule laid down at an early day by the court. The case of *Jenkins v. The Union Turnpike Company*, in 1804,⁵ decided that a failure by the subscriber to pay a required percentage at the time of subscribing was a good defense to an action on the subscription. This decision has been distinguished, questioned, and doubted by the courts.⁶ The law, however, in

holders from . . . men of straw. It was, moreover, meant to protect men from the consequences of making such subscriptions, under the influence of momentary excitements, which they could not fulfill." The statute made the subscription void. In the case of *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461 (1880), payment by note and mortgage was sustained. *Hayne v. Beauchamp*, 13 Miss. 515 (1846), holds that the payment by note amounted to an informal subscription, the statutory subscription being void. *Pine River Bank v. Hodsdon*, 46 N. H. 114 (1865). In Alabama it is held that a subscriber may set up that the company was not legally organized, in that twenty per cent, which the statute required to be paid before incorporation, had been paid in checks which were not to be presented for payment and had not been presented. *Haas v. Hall*, 20 S. Rep. 78 (Ala., 1896).

¹ Payment of a judgment, in an action for one call, estops the subscriber from setting up this defense. *Hall v. Selma*, etc. R. R., 6 Ala. (N. S.) 741 (1844).

² In *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491 (1859), the requirement was by by-law, not by charter. The subscription was to be void for non-payment. The court thought otherwise. The effect of non-payment is that "it is due and liable to be called for at any time—payable on demand, whenever needed by the corporation." *Greenville, etc. R. R. v. Wood-sides*, 5 Rich. L. (S. C.) 145 (1851), where the subscriber also voted the stock.

³ *Farmers's, etc. Co. v. Floyd*, 47 Ohio St. 525 (1890).

⁴ *East Gloucestershire R'y v. Bartholomew*, L. R. 3 Exch. 15 (1867); *Purdey's Case*, 16 W. R. 660 (1868); *McEuen v. West London, etc. Co.*, L. R. 6 Ch. App. 655 (1871)—the statute stating that the stock should not "issue" or "vest" until one-fifth should be paid. See also *Morton's Case*, L. R. 16 Eq. 104 (1873).

⁵ 1 *Caines's Cas.* 86, reversing *Union Turnp. Co. v. Jenkins*, 1 *Caines's Rep.* 381.

⁶ *Highland Turnp. Co. v. McKean*, 11 Johns. 98 (1814), the court saying: "It is a little difficult to ascertain the point upon which the court of

New York undoubtedly is that if the subscriber merely signs the subscription contract and does not pay the percentage, he may thereby defeat his liability on such subscription.¹

§ 175. In Pennsylvania a similar state of doubt has existed. The case of *Hibernia Turnpike Co. v. Henderson*,² in 1822, decided that a failure by the commissioners taking subscriptions

errors grounded their decision." A subscriber, who is also the commissioner, need not pay the required percentage to himself. In *Crocker v. Crane*, 21 Wend. 211 (1839), payment in checks was held not to be good, they evidently not having been given in good faith. The court say: "Receiving an occasional check might have been a fair substitute." *Thorp v. Woodhull*, 1 Sandf. Ch. 411 (1844), sustains the validity of a bond and mortgage in payment of a subscription in which the percentage had been paid by a worthless check. *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546 (1856), holds it not to be necessary "that each subscriber should pay five per cent upon his subscription, but only that five per cent on the amount of the stock subscribed should be actually paid" by some one. To the same effect, *Lake Ontario, etc. R. R. v. Mason*, 16 N. Y. 451 (1857), the court saying that the object was "to ensure the organization of real substantial companies in good faith, animated by an honest purpose, and having some degree of ability at least to undertake the proposed improvement." In the case of *Rensselaer, etc. Co. v. Barton*, 16 N. Y. 457, n. (1854), the court, in speaking of the decision in *Jenkins v. Union T. Co.*, say: "It may well be doubted whether the reasoning upon which it was based is sound, and whether, were the question to be again directly presented, this court would feel bound to follow it." *Black River, etc. R. R. v. Clarke*, 25 N. Y. 208 (1862), holds that "the subscription one day, with payment the next, would sat-

isfy the statute, and so would actual payment at any period after subscription with intent to effectuate and complete the subscription." See also *Beach v. Hazard*, as stated in 30 N. Y. 119 (1864); *Ogdensburg, etc. R. R. v. Wooley*, 3 Abb. App. Dec. 398 (1864). *Beach v. Smith*, 30 N. Y. 116 (1864), affirming *S. C.*, 28 Barb. 254, holds that payment in services performed under a contract with the company suffices. *Excelsior, etc. Co. v. Stayner*, 25 Hun, 91 (1881), holds that payment by check, on which payment is stopped, is insufficient. *Syracuse, etc. R. R. v. Gere*, 4 Hun, 392 (1875), sustains a suit by the corporation to collect such a check. See also *Ogdensburg, etc. R. R. v. Frost*, 21 Barb. 541 (1856). A certified check is good payment. *Re Staten Island, etc. R. R.*, 37 Hun, 422 (1885); *Re Staten Island, etc. R. R.*, 38 Hun, 381 (1885).

¹ *New York, etc. R. R. v. Van Horn*, 57 N. Y. 473 (1874), holding also that a subsequent statute cannot cure such omission to pay, and thereby render the subscriber liable. Even though a corporation accepts a note instead of cash in payment for a subscription, in violation of the statute, which provides that only money, labor done or property actually received shall be accepted in payment for stocks and bonds, yet a bank which discounted such note for a corporation may hold the corporation liable thereon. *First Nat. Bank v. Cornell*, 8 N. Y. App. Div. 427 (1896).

² 8 Serg. & R. 219. See also *Leighty v. Susquehanna, etc. Turnp. Co.*, 14 Serg. & R. 434 (1826).

to stock to require payment of the statutory percentage made the subscription void and not enforceable. Later decisions do not overthrow the rigid rule, but distinguish and practically destroy it by holding that this defense is barred by a subsequent statute curing the defect;¹ or by a waiver in attending corporate meetings and voting;² or by transferring the shares;³ or that the provision applies only to subscriptions taken by the commissioners;⁴ or, under the act of 1868, that the percentage must be paid on subscriptions after, but not on those before, incorporation;⁵ or that the requirement does not apply to a conditional subscription;⁶ or that it is waived by any acts indicating an intent to be bound as a stockholder.⁷

§ 176. *Failure of the corporation to obtain subscriptions to the extent of the full capital stock.*—It is an implied part of a contract of subscription that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed. This condition precedent to the liability of the subscriber need not be expressed in the corporate charter nor the subscription itself. It arises by implication from the just and reasonable understanding of a subscriber that he is to be aided by other subscriptions. This rule is supported also by public policy, in that corporate creditors have a right to rely upon a belief that the full capital stock of the corporation has been subscribed.⁸ If the corpora-

¹ Clark v. Monongahela Nav. Co., 10 Watts (Pa.), 364 (1840).

² Erie, etc. R'y v. Brown, 25 Pa. St. 156 (1855), the court saying: "There is no merit in such a defense. . . . The subscriber himself is under the highest moral obligation faithfully to perform the promise he has distinctly made." In Commonwealth v. West Chester R. R., 3 Grant's Cas. (Pa.) 200 (1855), the court held that failure to pay the percentage did not render the charter forfeitable.

³ Everhart v. West Chester, etc. R. R., 28 Pa. St. 339 (1857).

⁴ Philadelphia, etc. R. R. v. Hickman, 28 Pa. St. 318 (1857). *Contra*, under the act of 1868. See Bucher v. Dillsburg, etc. R. R. 76 Pa. St. 306 (1874).

⁵ Garrett v. Dillsburg, etc. R. R., 78 Pa. St. 465 (1875).

⁶ Hanover, etc. R. R. v. Haldeman, 82 Pa. St. 36 (1876).

⁷ Boyd v. Peach Bottom R'y, 90 Pa. St. 169 (1879), holding, however, that payment cannot be by promissory note, although a demand note.

⁸ The leading case on this defense is Salem Mill-dam Corp. v. Ropes, 23 Mass. 23 (1827), and 26 Mass. 187 (1829). In Livesey v. Omaha Hotel, 5 Neb. 50 (1876), Judge Redfield in the brief says: "This rule has been held inflexible in all cases, both for the security of the public and also of the subscribers;" Shurtz v. Schoolcraft, etc. R. R., 9 Mich. 269 (1861); Anvil Min. Co. v. Sherman, 74 Wis. 226 (1889); New York, etc. R. R. v. Hunt, 39 Conn. 75

tion commences business before the full capital stock is subscribed, the state may bring an action for the forfeiture of its

(1872); *Hale v. Sanborn*, 16 Neb. 1 (1884); *Haskell v. Worthington*, 94 Mo. 560 (1888); *Halsey Fire Engine Co. v. Donovan*, 57 Mich. 318 (1885); *Peoria, etc. R. R. v. Preston*, 35 Iowa, 115 (1872), the court saying that this is the rule, "unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscriptions;" *Stoneham Branch R. R. v. Gould*, 68 Mass. 277 (1854), the court saying: "This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts;" *Bray v. Farwell*, 81 N. Y. 600, 608 (1880), where the court said that the directors "had no authority to go on with insufficient means, and thus wreck the company;" *Selma, etc. R. R. v. Anderson*, 51 Miss. 829 (1876); *Hughes v. Antietam Mfg. Co.*, 34 Md. 316, 332 (1870); *Topeka Bridge Co. v. Cummings*, 3 Kan. 55 (1864); *Allman v. Havana, etc. R. R.*, 88 Ill. 521 (1878); *Temple v. Lemon*, 112 Ill. 51 (1884); *Littleton Mfg. Co. v. Parker*, 14 N. H. 543 (1844); *Hendrix v. Academy of Music*, 73 Ga. 437 (1884); *Stearns v. Sopris*, 4 Colo. App. 191 (1894); *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557 (1893); *Contoocook Valley R. R. v. Barker*, 32 N. H. 363 (1855); *Newburyport Bridge v. Story*, 23 Mass. 45, note (1827); *Belfast, etc. R. R. v. Cottrell*, 66 Me. 185 (1876); *Rockland, etc. Co. v. Sewall*, 80 Me. 400 (1888); *Memphis Branch R. R. v. Sullivan*, 57 Ga. 240 (1876); *Fox v. Allensville, etc. Turnp. Co.*, 46 Ind. 31 (1874); *Hain v. Northwestern, etc. Co.*, 41 Ind. 196 (1872), holding also that the corporation in suing must aver that the full capital stock has been subscribed; *Central Turnp. Corp. v. Valentine*, 27 Mass. 142 (1830), holding also that the corporation has the burden of proving subscriptions for the full capital

stock; *Warwick R. R. v. Cady*, 11 R. I. 131 (1875), where the charter said that the capital stock should not exceed a specified sum; *Fry v. Lexington, etc. R. R.*, 2 Met. (Ky.) 314 (1859), holding also that the corporation must aver full subscription; *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860). *Lail v. Mt. Sterling C. R. Co.*, 13 Bush (Ky.), 32 (1877), holds that the corporation need not aver full subscriptions. To same effect, *McKay v. Elwood*, 12 Wash. 579 (1895). *Cf. Monroe v. Fort Wayne, etc. R. R.*, 28 Mich. 272 (1873).

Where, also, the corporation is incorporated with a less capital stock than was proposed when the defendant subscribed, he is not bound by the subscription. *Santa Cruz R. R. v. Schwartz*, 53 Cal. 106 (1878). Subscribers are not liable until the whole amount is subscribed. They may recover back what they have paid. *Winters v. Armstrong*, 37 Fed. Rep. 508 (1889). A full subscription is not necessary if the subscriptions are payable to an agent and nothing is said about full subscription. *West v. Crawford*, 80 Cal. 19 (1889). A stockholder may defend on the ground that the amount required by the subscription list to be subscribed shall be subscribed before he is held liable, especially where misrepresentations are made as to the amount which had been subscribed when the defendant subscribed. The question is one for the jury. *Spellier, etc. Co. v. Leedom*, 149 Pa. St. 185 (1892). When the capital is increased after the defendant subscribed he cannot insist on the subscription of the capital stock as increased. *Port Edwards, etc. R'y v. Arpin*, 80 Wis. 214 (1891). *Cf. § 288, infra.* Subscription of the full capital was held necessary in *Exposition, etc. Co. v. Canal, etc.*

charter.¹ The subscriber, however, is liable for his proportion of the necessary expenses, preliminary to the incorporation and organization of the company.²

§ 177. The act of incorporation may, of course, vary this rule. Thus, it is well established that, where the charter authorizes the organization of the company, and the commencement of corporate work after a certain amount of the capital stock has been subscribed, such a charter provision is equivalent to an express authority to the corporation to call in the subscriptions as soon as this organization is effected and the specified subscriptions obtained.³ Subscriptions to the full

R'y, 42 La. Ann. 370 (1890). The question must be clearly raised by the findings, otherwise it will not be considered on appeal. *Arthur v. Clarke*, 46 Minn. 491 (1891). Where stockholders proceed to business before the minimum capital prescribed by statute is subscribed and before the requisite amount is paid in, they are liable to corporate creditors for such minimum capital. The creditors may sue them and the corporation in the same action. *Burns v. Beck, etc. Co.*, 83 Ga. 471 (1889). The defense of non-full subscriptions is available against creditors of the corporation. *Exposition, etc. Co. v. Canal, etc. R'y*, 42 La. Ann. 370 (1890). The text above was approved in *Portland, etc. R. R. v. Spillman*, 23 Oreg. 587 (1893), and *Denny Hotel Co. v. Schram*, 6 Wash. St. 134 (1893). A few cases seem to hold a contrary doctrine. *Newcastle, etc. Turnp. Co. v. Bell*, 8 Blackf. (Ind.) 584 (1847); *Oregon Cent. R. R. v. Scoggin*, 3 Oreg. 161 (1869); *York, etc. R. R. v. Pratt*, 40 Me. 447 (1855); *Cheraw, etc. R. R. v. White*, 10 S. C. 155 (1878). See also *Chubb v. Upton*, 95 U. S. 665, 668 (1877), probably a *dictum*. In the case of *Skowhegan, etc. R. R. v. Kinsman*, 77 Me. 370 (1885), the court seem to hold that, where there is in the subscription an express promise to pay, it is enforceable even though

the whole capital stock is not subscribed. If such a condition is expected, the court says it must be inserted in the subscription. It has been held that, where a subscription is made before incorporation, on a paper not fixing the capital stock, a failure to secure full subscription to the capital stock as fixed in the charter is no defense. *Belton Compress Co. v. Saunders*, 70 Tex. 699 (1887). That the full capital stock was not subscribed constitutes no defense where a creditor sues, see *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891).

¹ *People v. National Sav. Bank*, 11 N. E. Rep. 170 (Ill., 1889); affirmed, 129 Ill. 618 (1889).

² *Salem Mill-dam Corp. v. Ropes*, 23 Mass. 23 (1827).

³ *Schenectady, etc. Co. v. Thatcher*, 11 N. Y. 102 (1854); *Rensselaer, etc. Co. v. Wetsel*, 21 Barb. 56 (1855); *Hamilton, etc. Co. v. Rice*, 7 Barb. 157, 166 (1849); *Sedalia, etc. R'y v. Abell*, 17 Mo. App. 645 (1885); *Lincoln, etc. Co. v. Sheldon*, 44 Neb. 279 (1895); *Perkins v. Sanders*, 56 Miss. 733 (1879); *Hunt v. Kansas, etc. Bridge Co.*, 11 Kan. 412 (1873), the court saying that otherwise there would be no propriety in allowing the organization before the full capital was subscribed; *Hoagland v. Cincinnati, etc. R. R.*, 18 Ind. 452 (1862); *Hanover, etc. R. R. v. Haldeman*, 82 Pa. St. 36

amount of the capital stock are held not to be necessary. The defense is not good.

§ 178. Where the subscription itself specifies how much of the capital stock must be subscribed before payment may be enforced, such specifications are legal and effective, and until they are fully complied with the subscriber is not liable.¹ A subscription of this kind is a conditional subscription.² A con-

(1876); *Penobscot, etc. R. R. v. Bartlett*, 78 Mass. 244 (1858), holding so, even though no contracts for building the road were to be made until a larger subscription was obtained; *Boston, etc. R. R. v. Wellington*, 118 Mass. 79 (1873); *Minor v. Mechanics' Bank*, 1 Pet. 46 (1828); *New Haven, etc. R. R. v. Chapman*, 38 Conn. 56 (1871); *Illinois River R. R. v. Zimmer*, 20 Ill. 654 (1858); *Lexington, etc. R. R. v. Chandler*, 54 Mass. 311 (1847); *Willamette Freighting Co. v. Stanus*, 4 Oreg. 261 (1872); *Jewett v. Valley R'y*, 34 Ohio St. 601 (1878). A vigorous case to the contrary is *Galveston Hotel Co. v. Bolton*, 46 Tex. 633 (1877). The court said: "There were good reasons for organizing the company to be found in the increased facility of thereby raising the subscription to the amount fixed for the capital stock, and of other preliminary preparations for the execution of the work, when the subscription should reach that amount." A contrary rule "would render nugatory the most important provision of the charter, which is the amount of its capital stock." When the capital stock is to be fixed by the corporation between two limits, the subscription of the full amount as fixed is a subscription of the full capital stock. *Kennebec, etc. R. R. v. Jarvis*, 34 Me. 360 (1852). There need not be a full subscription where the statutes authorize an organization as soon as one-half is subscribed. *Astoria, etc. R. R. v. Hill*, 20 Oreg. 177 (1890). The statutes may allow the

corporation to proceed with business and collect subscriptions before the full capital stock is subscribed. *Schloss v. Montgomery Trade Co.*, 87 Ala. 411 (1889). Where calls may be made after one-quarter of the stock has been subscribed, the complaint must allege subscriptions to that amount. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490 (1895). Where the statute allows a call after twenty-five per cent has been subscribed, the full subscription of this twenty-five per cent is necessary. *Ventura, etc. R'y v. Hartman*, 116 Cal. 260 (1897). Full subscription is unnecessary where the charter allows the commencement of business "as soon as the directors think fit." *Mandel v. Swan, etc. Co.*, 154 Ill. 177 (1895).

¹ Where, by its terms, it is not to be binding until a certain amount is subscribed, it is enforceable when that amount is secured, although less than the full capital stock. *Bucksport, etc. R. R. v. Buck*, 65 Me. 536 (1876). - See also *Iowa, etc. R. R. v. Perkins*, 28 Iowa, 281 (1869). Organization authorized where "\$200 to any one mile" has been subscribed is satisfied by a \$200 subscription in general. *Fitch v. Poplar Flat, etc. Co.*, 13 S. W. Rep. 791 (Ky., 1890). Where the subscription list or articles of association signed by defendant expressly provide for the commencement of business before the full capital is subscribed, the defense is waived. *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316 (1891).

² See ch. V, *infra*.

dition that the subscription shall be payable only when sufficient subscriptions for the corporate purpose have been secured has been held to require funds sufficient to put the enterprise in full operation.¹ On the other hand, a subscription to pay "when required" renders the subscribers liable before the full capital stock is subscribed.²

§ 179. In England statutory provisions have almost entirely displaced the common-law rule. The principle that a subscriber is not liable until the full capital stock has been subscribed is recognized as having been the original rule at law. A few cases, however, seem to favor an opposite rule. Yet an eminent English authority says that, in all the cases in which the subscribers were held bound, they "had entered into a contract which precluded them from maintaining that the subscription of the whole of the originally proposed capital was an express or implied condition to their becoming shareholders." The English courts seem to have no clearly defined rule in this matter, but allow each case to turn largely on its own facts; releasing the subscriber if the discrepancy in the subscriptions is very large, and holding him liable if it is small, or if he in any way has aided the company in beginning business.³

¹ *People's Ferry Co. v. Balch*, 74 Mass. 303 (1857), the court holding that funds for the land, structures and boats must be in hand before the defendant becomes liable.

² *Cheraw, etc. R. R. v. Garland*, 14 S. C. 63 (1880).

³ *Norwich, etc. Navigation v. Theobald*, 1 Moody & M. 151 (1838), required full subscription in accordance with a statute. *Fox v. Clifton*, 6 Bing. 776 (1830), the earliest common-law English case on this subject, holds that the subscriber is not liable to corporate creditors unless the full capital stock has been subscribed. *Pitchford v. Davis*, 5 Mees. & W. 2 (1839), also fully agrees with the rule that prevails in this country. *Wontner v. Shairp*, 4 C. B. 404 (1847), sustained a recovery of amounts paid on a subscription, under misrepresentations

that the whole stock had been subscribed. *Waterford, etc. R'y v. Dalbiac*, 4 Eng. L. & Eq. 455 (1851), refused to allow the defense, since the charter allowed the corporation to purchase land before the full capital stock was subscribed. *Watts v. Salter*, 10 C. B. 477 (1850), holds the same, the subscriber having aided in the incorporation, and given the directors power to proceed. *Galvanized Iron Co. v. Westoby*, 21 L. J. Exch. 302 (1852), per B. Parke, says that at common law the subscriber is not liable unless the full capital stock is subscribed. *Contra*, *Lyon's Case*, 35 Beav. 646 (1866). *Johnston v. Goslett*, 3 C. B. (N. S.) 569 (1857), makes the directors liable to the subscriber for his deposit when they so proceed. *London, etc. Ins. Co. v. Redgrave*, 4 C. B. (N. S.) 524 (1858),

§ 180. Some difficulty has been experienced in determining what subscriptions shall be counted in ascertaining whether the full capital stock has been subscribed. Conditional subscriptions, the condition to which has not yet been performed by the corporation, are clearly not to be counted among the rest, since such subscriptions may never become enforceable.¹ This rule, if strictly insisted upon, would probably occasion great inconvenience to the corporation in enforcing the subscriptions for stock.

The subscriptions of married women, infants, or persons of unsound mind are to be excluded from the count.² So, also,

holds the subscriber liable, he having aided in the incorporation. *Ornamental, etc. Woodwork Co. v. Brown*, 2 Hurl. & C. 63 (1863), holds the subscriber liable, under the statute of 19 and 20 Vict., ch. 47, similar to the American statutes. See also *McDougall v. Jersey, etc. Co.*, 10 Jur. (N. S.) 1043 (1864). *Peirce v. Jersey Waterworks Co.*, L. R. 5 Exch. 209 (1870), required a certain amount to be subscribed, the charter itself so prescribing. *Elder v. New Zealand, etc. Co.*, 30 L. T. Rep. 285 (1874), the most important case on this subject, holds that, where the directors are about to proceed with only one-fourteenth of the capital stock subscribed, a subscriber may apply to the court and have his name removed from the subscribers' list. The court say that the case of *McDougall v. Jersey, etc. Co.*, 10 Jur. (N. S.) 1043 (1864), would have been decided otherwise had not two-thirds of the stock in that case been subscribed. See also *Howbeach Coal Co. v. Teague*, 5 Hurlst. & N. 151 (1860); *dictum* in *Re Jennings*, 1 Ir. Ch. 654 (1851).

¹*Troy, etc. R. R. v. Newton*, 74 Mass. 596 (1857), the condition being that the subscriber be allowed to pay in construction work; *Oskaloosa Agricultural Works v. Parkhurst*, 54 Iowa, 357 (1880); *Brand v. Lawrenceville, etc. R. R.*, 77 Ga. 506 (1887); *New York, etc.*

R. R. v. Hunt, 39 Conn. 75 (1872); *Cabot etc. Bridge v. Chapin*, 60 Mass. 50 (1850), where a subscription payable in other stock at par, when the market value was less, was not counted; *Ticonic, etc. Co. v. Lang*, 63 Me. 480 (1874). Subscriptions payable in property are not to be counted in ascertaining whether the full capital stock is subscribed. *California, etc. Co. v. Russell*, 88 Cal. 277 (1891), holding, also, that an agent's unauthorized subscription is not to be counted, even though subsequently ratified by the principal. Conditional subscriptions, the condition of which cannot be fulfilled until after incorporation, are not to be counted in ascertaining whether the requisite capital stock has been subscribed. *Portland, etc. R. R. v. Spillman*, 23 Oreg. 587 (1893). Subscription on condition that interest shall be paid is counted. *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536 (1863). *Cf. Greenville, etc. R. R. v. Coleman*, 5 Rich. (S. C.) 118 (1851). Invalid subscriptions are not counted. *Belfast, etc. R. R. v. Cottrell*, 66 Me. 185 (1876). *Cf. Swartwout v. Michigan Air Line R. R.*, 24 Mich. 389 (1872); § 79, *supra*.

²*Phillips v. Covington, etc. Bridge Co.*, 2 Metc. (Ky.) 219 (1859), holding that subscriptions of infants, married women, or insolvents are not to be counted unless already paid in. Fictitiously paid-up stock, and stock con-

the subscriptions of insolvents are excluded, unless at the time of subscribing they were apparently able to pay the subscription.¹ It is no defense to an action on a subscription that a part of the subscriptions were made by corporations and were not enforceable. Only the state can raise that objection.² Considerable difference of opinion exists as to whether subscriptions payable by their terms in labor or materials or contract work are to be included in the count.³ The better rule seems to be that the necessity of employing this method of carrying out many modern corporate enterprises requires that such subscriptions should be counted if the contract is made in good faith and the contractors are reasonably responsible men.⁴ The weight of authority, however, holds otherwise. The records of the corporation are sufficient and competent evidence that the full capital stock has been subscribed.⁵

vertible into corporate bonds, were counted. See also *Hahn's Appeal*, 7 Atl. Rep. 432 (Pa., 1886), excluding subscriptions of married women. *Cf. Litchfield Bank v. Church*, 29 Conn. 137 (1860). Payment of part with knowledge that a married woman's subscription was counted is a waiver. *Cornell's Appeal*, 114 Pa. St. 153 (1886). *Ultra vires* subscriptions of other corporations are not counted. *Berry v. Yates*, 24 Barb. 199 (1857).

¹ *Lewey's Island R. R. v. Bolton*, 48 Me. 451 (1860); *Belfast, etc. R. R. v. Brooks*, 60 Me. 568 (1872); *Denny Hotel Co. v. Schram*, 6 Wash. St. 134 (1893). The subsequent failure of some of the subscribers is immaterial. *Salem Mill-dam Corp. v. Ropes*, 26 Mass. 187 (1829). Where the subscriber is worth only \$5,400 and subscribes for \$64,000 of stock, he is apparently unable to pay. *Denny Hotel Co. v. Schram*, 6 Wash. St. 134 (1893). A corporation need not allege that the subscriptions making up the capital stock were all by solvent people. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329 (1896).

² *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58 (1895). The defense that part of the subscriptions were by an-

other corporation and illegal, and hence that the full capital stock was not subscribed, is not good as to subscribers who have paid part with knowledge. *Cole v. Satsop R. R.*, 9 Wash. 487 (1894).

³ Not counted where the contractor failed to complete the work. *New York, etc. R. R. v. Hunt*, 39 Conn. 75 (1872); *Troy, etc. R. R. v. Newton*, 74 Mass. 596 (1857), the court saying: "The receipt of the stock by them depended entirely upon a contingency, as the contractors might fail to do the work, and so no stock be earned;" *Oldtown, etc. R. R. v. Veazie*, 39 Me. 571 (1855), where the contract work was not completed. In the case of *Ridgefield, etc. R. R. v. Brush*, 43 Conn. 86 (1875), such subscriptions were counted, the contract for payment in work being parol, and not allowed to vary the apparently absolute subscription.

⁴ *Phillips v. Covington, etc. Bridge Co.*, 2 Metc. (Ky.) 219 (1859).

⁵ *Penobscot R. R. v. Dummer*, 40 Me. 172 (1855); *Penobscot R. R. v. White*, 41 Me. 512 (1856). Unless proof be introduced to destroy their effect. A call is notice that the full

The directors and stockholders are not liable for corporate debts merely because they commence business before the capital stock was subscribed. The incorporation was legal without it.¹

§ 181. A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express or implied from the acts or declarations of the subscriber.² Many different facts have been passed upon by the courts, and held either to constitute or not to constitute a waiver of this defense. Thus, it has been held to amount to a waiver for the subscriber to act as a director, attend meetings, and contract corporate debts;³ or to pay assessments for several years, with full knowledge of all the facts;⁴ or to write to the directors, requiring them to call a

amount has been subscribed. *Harlæm Canal Co. v. Seixas*, 2 Hall (N. Y.), 504 (1829); *Harlæm Canal Co. v. Spear*, 2 Hall (N. Y.), 510 (1829); *Litchfield Bank v. Church*, 29 Conn. 137 (1860), holding that the certificate of the commissioners that the full stock had been subscribed would not be questioned, even though they had counted married women's subscriptions. To same effect, see *Lane v. Brainerd*, 30 Conn. 565 (1862); *Marlborough Branch R. R. v. Arnold*, 75 Mass. 159 (1857). If the corporate records are destroyed or lost there should be other clear evidence. *Central Turnp. Corp. v. Valentine*, 27 Mass. 142 (1830).

¹ See § 243, *infra*.

² *Emmitt v. Springfield*, etc. R. R., 31 Ohio St. 23 (1876); *Hager v. Cleveland*, 36 Md. 476 (1872); *Masonic Temple Assoc. v. Channell*, 43 Minn. 353 (1890). In *Anderson v. Middle*, etc. R. R., 91 Tenn. 44 (1891), a special agreement was held to be a waiver of the full capital being subscribed, but not as to those who had not signed the agreement. A subscriber by paying calls may waive objections to the full capital stock being subscribed. *California, etc. Hotel Co.*

v. Callender, 94 Cal. 120 (1892). The whole capital stock must be subscribed before the subscriptions are enforced, unless the subscription contract provides otherwise. A subscriber may waive this, and the question of waiver is for the jury. *Hards v. Platte Valley, etc. Co.*, 35 Neb. 263 (1892). Where the subscribers have induced a contractor to proceed on the theory that the full capital has been subscribed, it is no defense that one subscription was invalid. *Gibbons v. Ellis*, 83 Wis. 434 (1892).

³ *Hager v. Cleveland*, 36 Md. 476 (1872). A defendant waives the defense that the full capital stock was not subscribed where he serves as a director, is present when calls are made, votes in favor of buying a building lot, serves on committees, prepares plans, etc. *Auburn, etc. Assoc. v. Hill*, 32 Pac. Rep. 587 (Cal., 1893).

⁴ *Morrison v. Dorsey*, 48 Md. 461 (1877). This defense is not waived by payment of calls in ignorance of the facts, where the statute requires a full subscription before business is commenced. *Birge v. Browning*, 11 Wash. 249 (1895).

meeting;¹ or to participate as a stockholder and committee-man for several months;² or to act as president of the corporation.³ But a subscriber does not waive this defense by paying a deposit;⁴ or by attending a meeting;⁵ or by participating in preliminary work and paying a statutory percentage required to be paid at the time of subscribing;⁶ or by paying assessments for surveys.⁷

§ 182. *Failure to fix definitely the capital stock, where the amount is left in the discretion of the corporation.*— Sometimes corporate charters, especially in the New England states, are granted without specifying the exact amount of the capital stock, but either fixing the outside limit or allowing the corporate authorities to fix it between certain specified limits. Where the charter leaves the amount of the capital stock in-

¹ *Tredwen v. Bourne*, 6 M. & W. 461 (1840), holding it to be evidence of waiver.

² *Sharpley v. Louth, etc. R'y*, L. R. 2 Ch. D. 663 (1876). A stockholder who receives and retains a certificate for increased stock cannot, after corporate insolvency, set up that the full increased capital was not subscribed. *Butler v. Aspinwall*, 33 Fed. Rep. 217 (1887). By organizing and proceeding, stockholders waive the defense that the full capital stock was not subscribed. *Dallemand v. Odd Fellows' Sav. Bank*, 74 Cal. 598 (1888).

³ *Corwith v. Culver*, 69 Ill. 502 (1873).

⁴ *Pitchford v. Davis*, 5 M. & W. 2 (1839).

⁵ *Wontner v. Shairp*, 4 C. B. 404 (1847); *New Hampshire R. R. v. Johnson*, 30 N. H. 390 (1855); *Orynski v. Loustanan*, 15 S. W. Rep. 674 (Tex., 1890), holding that this defense is not waived by attending a corporate meeting, the subscriber not knowing all the facts; nor is it waived by paying part of the subscription. Power in the directors to make calls when they see fit does not destroy this defense. A subscriber who attends meetings and participates in the or-

ganization waives the defense that the full capital stock has not been subscribed; but if he does so without knowledge of the fact that the full capital stock has not been subscribed he does not waive such defense. *Portland, etc. R. R. v. Spillman*, 23 Oreg. 587 (1893); *International, etc. Assoc. v. Walker*, 88 Mich. 62 (1891), holding that attendance at a meeting and voting are not necessarily a waiver.

⁶ *Livesey v. Omaha Hotel Co.*, 5 Neb. 50 (1876); *Oldtown, etc. R. R. v. Veazie*, 39 Me. 571 (1855), where as an officer the subscriber aided in preliminary work. This case goes further, and holds that there can be no waiver under any state of facts, but that the full capital stock is necessary. Acts and facts prior to the signing of the subscription do not constitute a waiver. *Curry Hotel Co. v. Mullins*, 93 Mich. 318 (1892).

⁷ *Memphis Branch R. R. v. Sullivan*, 57 Ga. 240 (1876). *Atlantic Cotton Mills v. Abbott*, 63 Mass. 423 (1852), holds that paying assessments and attempting to transfer is not a waiver. *May v. Memphis Branch R. R.*, 48 Ga. 109 (1873), holds that paying an assessment with notice of this defense is a waiver of it.

definite, it is the duty of the proper corporate authorities to determine what it shall be; and no subscriber can be held liable on his subscription until such determination is made.¹ After the capital stock is once fixed, there seems to be no rule preventing its being varied subsequently, provided the specified charter limits are observed.² It has been held that even subscriptions to the amount of the lowest limit allowed by the charter are insufficient, unless that limit has been designated by the corporate authorities as the amount of the capital stock.³ After the capital stock is so determined, the full amount thereof must be subscribed before any subscriber is liable.⁴ It is not necessary that the amount of the capital stock be fixed by formal declaration of the corporate authorities. It may be done by acts equivalent thereto. Thus, a resolution to close the books on a given day,⁵ or limiting the time of subscription and then closing the subscription books,⁶ or voting that a certain amount of stock in addition to existing subscriptions shall be issued,⁷ are the same as, and are equivalent to, an express resolution that the capital stock shall be the amount of subscriptions thus taken.

§ 183. *Irregular incorporation of the company.*—Under the laws of most of the states, charters of incorporation are obtained by complying with the provisions of what are called general incorporating acts. Usually these acts provide that a specified

¹ Worcester, etc. R. R. v. Hinds, 62 Mass. 110 (1851); Troy R. R. v. Newton, 74 Mass. 596 (1857); Pike v. Bangor, etc. R. R., 68 Me. 445 (1878); Somerset R. R. v. Clarke, 61 Me. 379 (1873). *Contra*, Warwick R. R. v. Cady, 11 R. I. 131 (1875); City Hotel v. Dickinson, 72 Mass. 586 (1856). In the case of Kirksey v. Florida, etc. Co., 7 Fla. 23 (1857), it was held that the corporate charter need not mention any capital stock or shares of stock, and yet subscriptions may be taken and enforced. In the case of Ward v. Griswoldville Mfg. Co., 16 Conn. 593 (1844), where the charter allowed the capital stock to vary from \$5,000 to \$50,000, it was assumed that the subscriptions were enforceable, although no fixed capital stock

had been settled upon. In White Mountains R. R. v. Eastman, 34 N. H. 124 (1856), the charter allowed assessments when the lower limit of the capital stock was reached.

² Somerset, etc. R. R. v. Cushing, 45 Me. 524 (1858); Troy, etc. R. R. v. Newton, 74 Mass. 596 (1857) — *dicta*, however, in both of these cases.

³ Pike v. Bangor, etc. R. R., 68 Me. 445 (1878).

⁴ Somerset, etc. R. R. v. Cushing, 45 Me. 524 (1858). *Cf.* Kennebec, etc. R. R. v. Jarvis, 34 Me. 360 (1852).

⁵ Lexington, etc. R. R. v. Chandler, 54 Mass. 311 (1847).

⁶ Bucksport, etc. R. R. v. Buck, 65 Me. 536 (1876).

⁷ Penobscot, etc. R. R. v. Bartlett, 78 Mass. 244 (1858).

number of persons, by filing at a public registry a certificate setting out certain facts, may thereby form a corporation for the purposes named in such certificate. The various steps to be taken, and the contents of each certificate, are prescribed by the statute. It frequently happens, however, that in the formation of a corporation under the statute some part of the proceeding, through inadvertence or mistake, is not strictly complied with. The same thing happens, also, under a special act incorporating a certain company, and requiring it to perform specified things in order to render the incorporation complete. These defects may render the corporate charter forfeitable at the instance of the state. Accordingly the question has arisen whether such defects in the process of becoming incorporated are a good and sufficient defense to an action by the corporation to collect subscriptions to its stock.

§ 184. When an action is brought to collect a subscription, either directly or indirectly for the benefit of corporate creditors, it is well established that the subscribers cannot defeat such action by the defense that the corporation was not an incorporation, by reason of its not having fully complied with the terms of the statute providing for such an incorporation.¹ Not

¹Hickling v. Wilson, 104 Ill. 54 (1882); Wheelock v. Kost, 77 Ill. 296 (1875); Casey v. Galli, 94 U. S. 673 (1876); Upton v. Hansbrough, 3 Biss. 417 (1873); S. C., 28 Fed. Cas. 839, the court saying: "I understand the rule to be well settled that, where papers having color of compliance with the statutes have been filed with the proper state officers and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the state, they are, as against a subscriber to its capital, held sufficient to constitute a corporation *de facto*, if supported by proof of user;" Clarke v. Thomas, 34 Ohio St. 46 (1874); Voorhees v. Receiver of Bank, 19 Ohio, 463 (1850); Ossipee Hosiery, etc. Co. v. Canney, 54 N. H. 295 (1874); McCune Min. Co. v. Adams, 35 Kan. 193 (1886); Hamilton v. Clarion, etc. R. R., 144 Pa. St.

34 (1891); Haase v. Mannheimer, 69 N. W. Rep. 810 (Minn., 1897); State Bank Bldg. Co. v. Peirce, 92 Iowa, 668 (1894); American Homestead Co. v. Linigan, 46 La. Ann. 1118 (1893); Ogden Clay Co. v. Harvey, 9 Utah, 497 (1894). An incorporator and subscriber cannot set up irregular incorporation as a defense. Wadesboro, etc. Co. v. Burns, 114 N. C. 353 (1894). Thompson v. Reno Sav. Bank, 19 Nev. 103, 171, 242, 291, 293 (1885), says: "The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those who participated in the incorporation of this bank, and, by a certificate made in pursuance of the statute, announced the amount of its capital stock, cannot, as against the creditors of the corporation, contradict their own certificate." The creditors of a consolidated company

only is the subscriber estopped, by the act of subscribing, from setting up this defense, but he is bound also by the rule that the existence of a corporation cannot be inquired into except by a direct proceeding in behalf of the state. It is sufficient that the corporation exists *de facto*. If there is no authority of law for such a corporation, the members are liable as partners.¹

§ 185. As between the corporation itself and the subscribers there is more difficulty and doubt in determining the rule. The great weight of authority lays down the broad rule that "where there is a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate alike of justice and of public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."² This, doubt-

may enforce subscriptions to the stock of the constituent companies, and the irregularity of the incorporation of the consolidated company is no defense. *Hamilton v. Clarion*, etc. R. R., 144 Pa. St. 34 (1891). See also ch. XIII.

¹ See ch. XIII.

² *Cooley, J., in Swartwout v. Michigan Air Line R. R.*, 24 Mich. 389 (1872). An important case on this subject is *Tar River Nav. Co. v. Neal*, 3 Hawks (N. C.), 520 (1825), where the court say that "even where it is shown that such charter has been granted upon a precedent condition, and persons are found in the quiet possession and exercise of those corporate rights, as against all but the sovereign the precedent condition shall be taken as performed." In this case the subscriber had participated in corporate meetings. *Wilmington, etc. R. R. v. Thompson*, 7

Jones, L. (N. C.) 387 (1860); *Brookville, etc. Co. v. McCarty*, 8 Ind. 392 (1856), holding also that the subscriber cannot set up that the corporation had forfeited its charter for misuser and non-user; *Central, etc. Assoc. v. Alabama, etc. Ins. Co.*, 70 Ala. 120 (1881), where the court say: "Whoever contracts with a corporation having a *de facto* existence, the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred." It also holds that a subsequent statute curing the defect is constitutional and effective; *Appleton Mut. F. Ins. Co. v. Jesser*, 87 Mass. 446 (1862), the court saying that where "persons were

less, is the law of the land, although a carefully-considered case in Missouri held to the contrary, and allowed a subscriber who had not done more than merely subscribe to set up this defense against the corporation, no creditor's rights being involved;

found, with the consent and under the authority of the designated corporators, and without objection on the part of the sovereign power, actually exercising the corporate powers and claiming and using the franchise, they constituted a corporation *de facto*; and the lawfulness of their organization cannot be impeached collaterally in an action to recover an assessment;" *McCarthy v. Lavasche*, 89 Ill. 270 (1878), holding that the defense is not allowable, even though the statute creating the corporation be unconstitutional. See *St. Louis, etc. Assoc. v. Hennessy*, 11 Mo. App. 555 (1882); *Slocum v. Providence Steam, etc. Co.*, 10 R. I. 112 (1871); *McHose v. Wheeler*, 45 Pa. St. 32 (1863); *Tarbell v. Page*, 24 Ill. 46 (1860), where no certificate was filed; *Walworth v. Brackett*, 98 Mass. 98 (1867); *Hanover, etc. R. R. v. Haldeman*, 82 Pa. St. 36 (1876), holding that non-user rendering the charter forfeitable is no defense; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269 (1882), holding that actual judgment of forfeiture is no defense; *South Bay, etc. v. Gray*, 30 Me. 547 (1849); *Danbury, etc. R. R. v. Wilson*, 23 Conn. 435 (1853), where the subscriber acted as a director; *Central Plank Road Co. v. Clemens*, 16 Mo. 359 (1852); *Maltby v. Northwestern Va. R. R.*, 16 Md. 422 (1860), where the subscriber had already paid calls; *Cromford, etc. R'y v. Lacey*, 3 Y. & J. 80 (1829), where incorporation was obtained by a false representation to parliament; *Rockville, etc. Co. v. Van Ness*, 2 Cranch, C. C. 449 (1824); *S. C.*, 20 Fed. Cas. 1080, where the subscriber had taken part in an election; *Monroe v. Fort Wayne, etc. R.*

R., 28 Mich. 273 (1873), where only three instead of five signed the certificate; *Rice v. Rock Island, etc. R. R.*, 21 Ill. 93 (1859); *Hunt v. Kansas, etc. Bridge Co.*, 11 Kan. 412 (1873), where the subscriber acted as director; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461 (1880); *Evansville, etc. R. R. v. Evansville*, 15 Ind. 395 (1860); *Stoops v. Greensburgh, etc. Co.*, 10 Ind. 47 (1857); *Centre, etc. Turnp. Co. v. McConaby*, 16 Serg. & R. (Pa.) 140 (1827), and cases in ch. XXXVIII on this subject; *Gill v. Kentucky, etc. Min. Co.*, 7 Bush (Ky.), 635 (1871); *Wood v. Coosa, etc. R. R.*, 32 Ga. 273 (1861); *Hager v. Cleveland*, 36 Md. 476 (1872); *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545 (1858). See also *Oregon Cent. R. R. v. Scoggin*, 3 Oreg. 161 (1869), holding, under a statute, that the subscription may be sued on before the organization is completed. It is no defense that the corporation was organized on a fourteen-day notice instead of fifteen days. *Ossipee Hosiery, etc. Co. v. Canney*, 54 N. H. 295 (1874). Stockholders, when sued on their statutory liability, cannot impeach the organization of the company. *Aultman v. Waddle*, 40 Kan. 195 (1888). The subscriber cannot set up that the charter was unconstitutional. *Dows v. Naper*, 91 Ill. 44 (1878).

In New York the first case is *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238 (1817); then came *Schenectady, etc. Co. v. Thatcher*, 11 N. Y. 102 (1854); *Eaton v. Aspinwall*, 19 N. Y. 119 (1859); *Methodist, etc. Church v. Pickett*, 19 N. Y. 483 (1859), where the court said it is sufficient for the corporation to be *de facto*. "Two things are necessary . . . in

and the court declared that all the cases denying the defense were cases where the subscriber had acquiesced, "either by the payment of part of the subscription or by becoming a director, or by attending meetings of stockholders, or by any

order to establish the existence of a corporation *de facto*, viz.: (1) The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user, by the party to the suit, of the rights claimed to be conferred by such charter or law. . . . The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization." *Black River, etc. R. R. v. Clarke*, 25 N. Y. 208 (1862); *Leonardsville Bank v. Willard*, 25 N. Y. 574 (1862); *Buffalo, etc. R. R. v. Cary*, 26 N. Y. 75 (1862); *Aspinwall v. Sacchi*, 57 N. Y. 331 (1874); *Dorris v. French*, 4 Hun, 292 (1875). Not, however, where, at the time of signing the articles, the names of the directors, required to be inserted, were not inserted. *Dutchess, etc. R. R. v. Mabbett*, 58 N. Y. 397 (1874); *Cayuga Lake R. R. v. Kyle*, 64 N. Y. 185 (1876); *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876); *De Witt v. Hastings*, 69 N. Y. 518 (1877), admitting the defense on the ground that there was no user of a corporate franchise; *Ruggles v. Brock*, 6 Hun, 164 (1875); *Mead v. Keeler*, 24 Barb. 20 (1857); *Abbott v. Aspinwall*, 26 Barb. 202 (1857); *Childs v. Smith*, 55 Barb. 45 (1869); and see *Childs v. Smith*, 46 N. Y. 34 (1871); *McFarlan v. Triton Ins. Co.*, 4 Denio, 392 (1847). This is also the rule in the federal courts. *Webster v. Upton*, 91 U. S. 65 (1875); *Chubb v. Upton*, 95 U. S. 665 (1877). *Contra*, *Thompson v. Guion*, 5 Jones, Eq. (N. C.) 113 (1859). *Cf.* *Katama Land Co. v. Holley*, 129 Mass. 540 (1880). The lapse of the charter, by

limitation of time within which work must be commenced, is a good defense. *McCully v. Pittsburgh, etc. R. R.*, 32 Pa. St. 25 (1858). Subscribers to increased capital stock cannot escape liability therefor by setting up that the notice of increase was not published as required by statute. *Handley v. Stutz*, 139 U. S. 417 (1891). A subscriber to stock in a West Virginia corporation doing all its business in Minnesota cannot set up in defense that the company was not legally incorporated, or that the plaintiff is not a corporation, he having participated in its incorporation. *Minnesota, etc. Co. v. Denslow*, 46 Minn. 171 (1891). It is no defense that the charter was not registered in all the counties through which the road runs. *Anderson v. Middle, etc. R. R.*, 91 Tenn. 44 (1891). Concerning the question of who can complain of mistakes, irregularities, and illegalities in the corporation, see § 5, *supra*. Where the general railroad act provides that unless work is commenced within two years the charter shall be void, a subscriber for stock prior to incorporation may set up the defense that two years have elapsed and the charter is void. *Bywaters v. Paris, etc. R'y*, 73 Tex. 624 (1889). A subscriber cannot deny the incorporation of the company when sued on a note given for his subscription. *Columbia Electric Co. v. Dixon*, 46 Minn. 463 (1891). A note given to be applied in payment of a subscription in a company to be formed has been held to be good, even though the corporation was not legally formed, an attempt at incorporation having been made. *Smith v. Gillen*, 52 Ark. 442 (1890).

other act indicating an acquiescence in the validity of his subscription."¹

§ 186. There is a different class of cases in which a subscriber for stock is allowed to make the defense that the corporation has not been regularly and legally incorporated. Where the subscriber made his contract of subscription previous to and in anticipation of the incorporation, and does not, by his subsequent acts, acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable. The rule that a person contracting with a corporation recognizes thereby its capacity to contract, and cannot afterwards deny it in that transaction, does not apply to one who subscribes before incorporation. He may insist upon the organization of a regular and legal corporation.²

§ 187. *Ultra vires acts of the directors of the corporation.*—A subscriber for stock in a corporation cannot defeat an action to collect such subscription by the defense that the directors or the corporation itself have done corporate acts which are beyond the corporate powers.³ There are other remedies open to

¹ *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126 (1874).

² *Dorris v. Sweeney*, 60 N. Y. 463 (1875); *Rikhoff v. Brown's, etc. Co.*, 68 Ind. 388 (1879); *Indianapolis Furnace, etc. Co. v. Herkimer*, 46 Ind. 142 (1874); *Nelson v. Blakey*, 47 Ind. 38 (1874); *McIntire v. McLain Ditching Assoc.*, 40 Ind. 104 (1872); *Richmond Factory Assoc. v. Clarke*, 61 Me. 351 (1873); *Reed v. Richmond Street R. R.*, 50 Ind. 342 (1875); *Taggart v. Western Md. R. R.*, 24 Md. 563 (1866), the court saying: "The preponderance of authority in favor of a strict compliance with the provisions of the charter, in cases of subscription prior to the organization of the company, is such as is not to be disregarded." *Cf. Buffalo, etc. R. R. v. Hatch*, 20 N. Y. 157 (1859). A subscriber for stock prior to incorporation may defeat the subscription by the defense that the company has not been legally incorporated. *Capps v. Hastings, etc. Co.*, 40 Neb. 470 (1894). A

failure to acknowledge the articles of incorporation is a good defense to a subscriber to them who is sued upon his subscription. *Greenbrier Ind. Exposition v. Rodes*, 37 W. Va. 738 (1893). The "records, books, and minutes" of a corporation are sufficient evidence of its incorporation. *Glenn v. Orr*, 96 N. C. 413 (1887). A subscriber may deny that a consolidated company which succeeds his own was legally incorporated. *Mansfield, etc. R. R. v. Stout*, 26 Ohio St. 241 (1875); *Brown v. Dibble*, 65 Mich. 520 (1887). In suing on an original subscription the corporation must allege that it has been duly incorporated. The payment of part of the subscription is no waiver of the defense. *Schloss v. Montgomery Trade Co.*, 87 Ala. 411 (1889). Indefiniteness in the statement of the objects of incorporation is no defense. *Owenton, etc. Co. v. Smith*, 13 S. W. Rep. 426 (Ky., 1890).

³ *Cravens v. Eagle Cotton-Mills Co.*,

the subscriber. He may either enjoin such *ultra vires* acts, or may have them set aside if already accomplished.¹ This defense is clearly distinguishable from the common defense of amendments to the charter, by the fact that the acts here complained of have no sanction from the legislative authorities.² Thus, it has been held that a subscriber cannot defeat an action to collect his subscription by showing that the corporation has, without authority of law, and in excess of its powers, executed a lease or sale of the road;³ or illegally issued its bonds;⁴ or

120 Ind. 6 (1889); *First Municipality of New Orleans v. Orleans Theatre Co.*, 2 Rob. (La.) 209 (1842); *Hannibal, etc. Co. v. Menefee*, 25 Mo. 547 (1857); *Vicksburg, etc. R. R. v. McKean*, 12 La. Ann. 638 (1857); *Smith v. Tallassee, etc. P. R. Co.*, 30 Ala. 650 (1857); *City Hotel v. Dickinson*, 72 Mass. 586 (1856); *Courtright v. Deeds*, 37 Iowa, 503 (1873); *Hammett v. Little Rock, etc. R. R.*, 20 Ark. 204 (1859). In *Macedon, etc. Co. v. Lapham*, 18 Barb. 312 (1854), however, an *ultra vires* extension of the line was held to be a good defense. A subscriber cannot set up that the corporation has not complied with the provisions of its charter. *Toledo, etc. R. R. v. Johnson*, 49 Mich. 148 (1882). *Ultra vires* acts and no notice of meetings are not good defenses. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). If a manufacturing corporation does not locate its works in the place prescribed by its articles of incorporation, a subscriber to stock may withdraw his subscription. *Auburn, etc. Works v. Shultz*, 143 Pa. St. 236 (1891).

¹ "The stockholder has his remedy by injunction; not to enjoin the collection of calls due upon his stock, but to restrain the corporation from the particular violation or abuse of its charter complained of." *Mississippi, etc. R. R. v. Cross*, 20 Ark. 443 (1859). See also *Illinois, etc. R. R. v. Cook*, 29 Ill. 237 (1862). In *Ex parte Booker*, 18 Ark. 338 (1857), an appli-

cation for an injunction to restrain the corporation from enforcing the payment of a subscription, on the ground that the corporation had committed *ultra vires* acts, was refused. And see also ch. XXVIII, *infra*.

² *Caley v. Philadelphia R. R.*, 80 Pa. St. 363 (1876). A change in the law between the time of making a subscription and the obtaining of the charter may release or render illegal the subscriptions. *Knox v. Childersburg Land Co.*, 86 Ala. 180 (1889). Where the statutes under which the company is organized allow the objects of the company to be changed on a vote of the stockholders, a dissenting stockholder is not released from his subscription by such change. *Mercantile Statement Co. v. Kneal*, 51 Minn. 263 (1892). For the principles of law herein relative to amendments to the charter, see § 502, etc., *infra*.

³ *Hays v. Ottawa, etc. R. R.*, 61 Ill. 422 (1871); *Ottawa, etc. R. R. v. Black*, 79 Ill. 262 (1875); *Illinois Midland R'y v. Barnett*, 85 Ill. 313 (1877). See also *Tuttle v. Michigan, etc. R. R.*, 35 Mich. 247 (1877); *Troy, etc. R. R. v. Kerr*, 17 Barb. 581 (1854). Or the whole of a business. *Plate Glass Univ. Ins. Co. v. Sunley*, 8 El. & Bl. 47 (1857). But see *South Georgia, etc. R. R. v. Ayres*, 56 Ga. 230 (1876).

⁴ *Merrill v. Reaver*, 50 Iowa, 404 (1879).

purchased shares of its own stock,¹ or the stock of another corporation;² or changed the location or route of the road.³ The last instance, especially, has been a frequent defense; but it has been uniformly discountenanced by the courts where the change in the route was made, not by an amendment to the charter, but by the arbitrary, unauthorized act of the corporate authorities. Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.⁴ It is no defense to an action to enforce a subscription that after incorporation the company proceeded to form an illegal combination of competitors in trade.⁵

§ 188. *Frauds and mismanagement of directors.*—This defense is very similar to the preceding one, and is governed by the same rules of law. A stockholder cannot defeat an action to collect his subscription by the defense that the corporate affairs have been managed fraudulently or recklessly or negligently.⁶ The stockholder's remedies for such evils are of a different nature. For fraud, he may bring the guilty parties to an accounting;⁷ for mismanagement, his only remedy is the corporate elections. In no case has he been allowed to escape

¹ *Re Republic Ins. Co.*, 3 Biss. 452 (1873); S. C., 20 Fed. Cas. 544.

² *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220 (1877).

³ *Central P. R. Co. v. Clemens*, 16 Mo. 359 (1852); *Mississippi, etc. R. R. v. Cross*, 20 Ark. 443 (1859). Cf. *Rives v. Montgomery, etc. Co.*, 30 Ala. 92 (1857). Where, however, the terminus was made two thousand feet away from the location designated by charter, this fact was held to constitute *prima facie* a good defense. *Chartiers R. R. v. Hodgins*, 77 Pa. St. 187 (1874). See also § 82, *supra*. A change in the route under statutes existing before the incorporation does not release subscribers. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890).

⁴ *Dougan's Case*, 28 L. T. Rep. 60 (1873).

⁵ *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58 (1895).

⁶ *People v. Barnett*, 91 Ill. 422 (1879); *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220 (1877); *Glenn v. Rosborough*, 26 S. E. Rep. 611 (S. C., 1897); *Merrill v. Reaver*, 50 Iowa, 404 (1879). Depreciation of the stock by reason of mismanagement is no defense. *People v. Barnett*, 91 Ill. 422 (1879). It is no defense that the funds of the company have been wasted. *Cook v. Hopkinsville, etc., Co.*, 32 S. W. Rep. 748 (Ky., 1895). Mere mismanagement is no defense. *Hards v. Platte, etc. Co.*, 46 Neb. 709 (1896).

⁷ See ch. XXXIX. In *Hodgkinson v. National, etc. Ins. Co.*, 26 Beav. 473 (1859), equity restrained the enforcement of calls already made, by reason of the fraud of the directors; but

liability on his subscription by reason thereof. Thus, it is no defense that the corporate authorities fraudulently placed an overvaluation on property purchased by them for the corporation;¹ nor that they have made a fraudulent contract with a construction company.²

§ 189. *Delay and abandonment of the enterprise.*—As a general rule, it is no defense to an action on a subscription to allege that the enterprise has been unduly delayed.³ The defense frequently is that there has been a non-user of the corporate franchises.⁴ It is, however, a well-established principle that non-user of corporate franchises can be complained of only by the state or in the name of the state. A subscriber has been held not to be discharged by the fact that the corporation was engaged thirteen years in completing the enterprise—a turn-pike.⁵ Nor does a temporary abandonment of the work release the subscriber.⁶ But when the corporate work was not commenced for nine years, and in the meantime the subscriber had acted on the supposition of an abandonment and had sold property which the road was expected to benefit, he was held not liable on the subscription.⁷ Where a person signs an agree-

it was conceded in this case that the subscriber was still liable on his subscription.

¹ *Hornaday v. Indiana, etc. R. R.*, 9 Ind. 263 (1857); *Dorris v. French*, 4 Hun, 292 (1875), where a patent-right was purchased by the directors from themselves, for the corporation, at an exorbitant price.

² *People v. Logan County*, 63 Ill. 374, 387 (1872).

³ *Pickering v. Templeton*, 2 Mo. App. 424 (1876); *Miller v. Pittsburgh, etc. R. R.*, 40 Pa. St. 237 (1861), where there was a delay of two and a half years, the court saying: "Until it can be shown how railroads can be built without money, no such defense as is here set up can prevail;" *First Nat. Bank v. Hurford*, 29 Iowa, 579 (1870), where there was a delay in the performance of a condition subsequent to the subscription. See also *Union Hotel Co. v. Hersee*, 79 N. Y. 454 (1880); reversing 15 Hun, 371.

Boyle's Case, 54 L. J. (Ch.) 550 (1885), holds that after a winding-up has commenced there can be no withdrawal; but the court in a *dictum* clearly says that an unreasonable delay in organizing will authorize a withdrawal by the subscriber. But where the charter has lapsed by reason of not complying with its terms, the stockholder is not liable. *Sodus Bay, etc. R. R. v. Lapham*, 43 Hun, 314 (1887).

⁴ *Mississippi, etc. R. R. v. Cross*, 20 Ark. 443 (1855); *Hammett v. Little Rock, etc. R. R.*, 20 Ark. 204 (1859).

⁵ *Gibson v. Columbia, etc. Co.*, 18 Ohio St. 396 (1868).

⁶ *McMillan v. Maysville, etc. R. R.*, 15 B. Mon. (Ky.) 218 (1854).

⁷ *Fountain Ferry Turnp. Co. v. Jewell*, 8 B. Mon. (Ky.) 140 (1848). A note in payment of a subscription, payable by its terms after the road had been partially completed, is not enforceable where the enterprise was

ment to subscribe, but for three years after incorporation the agreement is never acted upon and no stock is ever issued to him or assessment made upon him, he is not liable on such subscription to creditors.¹ An abandonment of part of the enterprise, however, is no defense.²

A subscriber cannot defeat the subscription by the fact that the corporation has not completed, and has no intention of completing, the road in its entirety;³ nor by the fact that the road has been sold under foreclosure.⁴ In Pennsylvania a failure on the part of the corporation to make a call for the subscription within six years, the statutory time of limitations on the collection of parol debts, is held to constitute an abandonment of the subscription, and to be a good defense.⁵ If the corporation

abandoned and fourteen years afterwards was revived and the road built. *Blake v. Brown*, 80 Iowa, 277 (1890).

¹ *United States, etc. Co. v. Davies*, 2 Kan. App. 611 (1895). Where a person signs an agreement in October, 1892, "to take" certain preferred stock in a proposed corporation, but the corporation is not fully organized until June, 1894, the delay in accepting the contract is unreasonable and the corporation cannot enforce the subscription. *Carter, etc. Co. v. Hazzard*, 68 N. W. Rep. 74 (Minn., 1896). An indefinite agreement of a person to take stock in a water company to be organized cannot be enforced by a corporation which has obtained a charter but has never held an organization meeting nor taken subscriptions to stock. *Nemaha, etc. Co. v. Settle*, 54 Kan. 424 (1894). In *Harrison Nat. Bank v. Votaw*, 51 Kan. 362 (1893), the creditors of a corporation failed to enforce subscriptions made prior to the incorporation, there being evidence of an intent to abandon the original subscriptions and to obtain others.

² *Dorman v. Jacksonville, etc. Co.*, 7 Fla. 265 (1857). It is no defense that the company had abandoned a part of its business nor that the company

was organized for the sole benefit of the charter members. *Dallas, etc. Mills v. Clancey*, 15 S. W. Rep. 194 (Tex., 1891). Where a company is organized to work gold mines in a specified place, as well as elsewhere, and the company actually works mines elsewhere, but not in the specified place, the main purpose of the company is not carried out and a dissolution may be had. *Re Coolgardie, etc. Mines*, 76 L. T. 269 (1897).

³ *Buffalo, etc. R. R. v. Gifford*, 87 N. Y. 294 (1882), aff'g 22 Hun, 359. It is no defense that the road has not been fully completed. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890); *Leshner v. Karshner*, 47 Ohio St. 302 (1890).

⁴ *Buffalo, etc. R. R. v. Gifford*, 87 N. Y. 294 (1882), aff'g 22 Hun, 359.

⁵ *Pittsburgh, etc. R. R. v. Byers*, 32 Pa. St. 22 (1858). The same rule is stated less broadly in *McCully v. Pittsburgh, etc. R. R.*, 32 Pa. St. 25 (1858), where the court says: "If the delay was not satisfactorily accounted for, subscribers would be at liberty, after that lapse of time, to consider the enterprise abandoned." In this case an actual abandonment and return of subscription money to other subscribers was held to release all the subscribers. In Delaware, etc.

is insolvent, and the subscription is needed to pay corporate creditors, abandonment cannot be set up.¹

§ 190. *Failure of the corporate enterprise.*—The entire failure of the enterprise and the insolvency of the corporation constitute no defense to an action on calls.² This defense would seem on the face of it to be frivolous, and yet is occasionally set up. Under the American doctrine a subscription is enforceable most of all when it is needed to pay corporate creditors. This defense is closely allied to those that precede, and differs in little from the defense of abandonment of the enterprise.

§ 191. *Secret agreement as to liability—Subscriptions of other subscribers released or canceled, or given on special terms.* It is no defense for one subscriber, when sued upon his subscription, to allege that the subscriptions of others have been canceled, or that secret and more favorable terms were given to them than to him. If there has been a legal cancellation of other subscriptions the defendant cannot complain.³ If he has the same right to a cancellation he may obtain it by a suit for that purpose.⁴ Moreover, a secret agreement of the corporation with certain subscribers to stock, whereby they are to be released from payment, or to have some other advantage not common to all the subscribers, is no defense to a subscriber who was not promised the same advantages.⁵ Secret agree-

R. R. v. Rowland, 9 Atl. Rep. 929 (Penn., 1887), it was submitted to the jury whether the subscriber had been released by an abandonment of the enterprise. See also § 195, *infra*.

¹Phoenix Warehousing Co. v. Badger, 67 N. Y. 294 (1876); Smith v. Gower, 2 Duv. (Ky.) 17 (1865); Hardy v. Merriweather, 14 Ind. 203 (1860); and see the defense in § 190, *infra*.

²Bish v. Bradford, 17 Ind. 490 (1861); Morgan County v. Thomas, 76 Ill. 120 141 (1875); Four-Mile Valley R. R. v. Bailey, 18 Ohio St. 208 (1868). Assessments are collectible though the work is not completed. Red Wing Hotel Co. v. Friedrich, 26 Minn. 112 (1879). See Buffalo, etc. R. R. v. Gifford, 87 N. Y. 294 (1882), *aff'g* 22 Hun, 359.

³Rensselaer, etc. Co. v. Wetsel, 21 Barb. 56 (1855). If, however, the cancellation is on account of an abandonment of the enterprise, any other subscriber, when sued subsequently on his subscription, may set up such abandonment and cancellation, and thereby defeat the action. McCully v. Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858).

⁴Crawford County v. Pittsburgh, etc. R. R., 32 Pa. St. 141 (1858).

⁵Anderson v. Newcastle, etc. R. R., 12 Ind. 376 (1859); Jewett v. Valley R'y, 34 Ohio St. 601 (1878); Agricultural, etc. Ins. Co. v. Fitzgerald, 15 Jur. 489 (1850); Memphis Branch R. R. v. Sullivan, 57 Ga. 240 (1876); Hall v. Selma, etc. R. R., 6 Ala. (N. S.) 74 (1844); Connecticut, etc. R. R. v. Bailey, 24 Vt. 465 (1852); Jewell v.

ments to release are void, and the subscribers receiving them are liable on their subscriptions absolutely, as though no special advantages had been promised.¹ Being so, a subscriber, though he did not participate therein, cannot complain. It is no defense that the subscription of another person has been marked "canceled," where there is no proof that defendant subscribed on the faith of such other subscription.² The fact that the corporation has forfeited the stock of other subscribers, and has compromised with still others, is no defense to a subscriber sued for calls.³ So, also, the failure of another subscriber to pay the percentage required by statute is not a defense.⁴ Where several subscribers refused to take their stock, and finally, to induce them to do so, a party agrees secretly with one of them to purchase his holdings, such an agreement may be enforced.⁵

§ 192. *Failure of the corporation to tender a certificate.*—It is no defense to an action on a subscription to allege that the corporation has not delivered nor tendered to the defendant the certificate of stock to which he is entitled.⁶ The certificate

Rock River Paper Co., 101 Ill. 57 (1881); *Berry v. Yates*, 24 Barb. 199 (1857); *Nickerson v. English*, 142 Mass. 267 (1886). In *Galena, etc. R. R. v. Ennor*, 116 Ill. 55 (1886), the court said: "Such secret agreement was fraudulent as to the other subscribers, and was void and of no avail, and the subscription is to be regarded as a valid one for the amount subscribed." See also *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 171, 242, 291, 293 (1885). The subscriber has the burden of proof that other subscriptions are colorable and fictitious. *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233 (1878). The case of *Rutz v. Esler, etc. Mfg. Co.*, 3 Ill. App. 83 (1878), is contrary to the general rule. The case of *New York Exchange Co. v. De Wolf*, 31 N. Y. 273 (1865), reversing 5 Bosw. 593, holds that a subscriber may defeat an action on his subscription by showing that other subscriptions were unauthorized and not enforceable.

¹ See § 137, *supra*. Quoted and approved in *Armstrong v. Danahy*, 75 Hun, 405 (1894).

² *Whittlesey v. Frantz*, 74 N. Y. 456 (1878).

³ *Dorman v. Jacksonville, etc. Co.*, 7 Fla. 265 (1857). It is no defense that other unpaid subscriptions have been compromised, where it appears that even if no compromise had been made the entire subscriptions would have been insufficient to pay all the debts. *Bennett v. Glenn*, 55 Fed. Rep. 956 (1893).

⁴ *Swartwout v. Michigan Air Line R. R.*, 24 Mich. 389 (1872).

⁵ *Traphagen v. Sagar*, 63 Minn. 317 (1895).

⁶ *Burr v. Wilcox*, 22 N. Y. 551 (1860), aff'g 6 Bosw. 198; *Chandler v. Northern Cross R. R.*, 18 Ill. 190 (1856); *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893); *Holland v. Duluth, etc. Co.*, 68 N. W. Rep. 50 (Minn., 1896); *Walter, etc. Co. v. Robbins*, 56 Minn. 48 (1893); *San Joaquin, etc. Co. v. Beecher*, 101

is merely the stockholder's evidence of title to his stock. It is not the stock itself, but only a convenient representative of it. He would be a full stockholder, with all the rights of one, even

Cal. 70 (1894); Nebraska Exp. Assoc. v. Townley, 46 Neb. 893 (1896); Barron v. Burrill, 86 Me. 66 (1893); Glenn v. Rosborough, 26 S. E. Rep. 611 (S. C., 1897); Miller v. Wild Cat, etc. Co., 52 Ind. 51 (1875); New Albany, etc. R. R. v. McCormick, 10 Ind. 499 (1858); Slipper v. Earhart, 83 Ind. 173 (1882); Paducah, etc. R. R. v. Parks, 86 Tenn. 554 (1888); Heaston v. Cincinnati, etc. R. R., 16 Ind. 275 (1861); Kennebec, etc. R. R. v. Jarvis, 34 Me. 360 (1852); Chaffin v. Cummings, 37 Me. 76 (1853). In behalf of corporate creditors, where the corporation is insolvent, a person is often held to be a stockholder although no certificate has been issued to him, and the ordinary *indicia* of stockholdership do not indicate that he is a stockholder. Sanger v. Upton, 91 U. S. 56 (1875); Upton v. Tribilcock, 91 U. S. 45 (1875); Slee v. Bloom, 19 Johns. 456 (1822); Dorris v. French, 4 Hun, 292 (1875); Hamilton, etc. Co. v. Rice, 7 Barb. 157, 167 (1849); Clark v. Farrington, 11 Wis. 306, 327 (1860); Haynes v. Brown, 36 N. H. 545, 563 (1858); Chaffin v. Cummings, 37 Me. 76, 83 (1853); Griswold v. Seligman, 72 Mo. 110 (1880); Boggs v. Olcott, 40 Ill. 303 (1866); *Re* South Mountain, etc. Co., 7 Sawy. 30 (1881); Upton v. Burnham, 3 Biss. 431 (1873); S. C., 28 Fed. Cas. 831; Johnson v. Albany, etc. R. R., 40 How. Pr. 193 (1870); Payne v. Elliot, 54 Cal. 339 (1880). The subscriber may stipulate otherwise in his subscription. Summers v. Sleeth, 45 Ind. 598 (1874); Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248 (1870); South Georgia, etc. R. R. v. Ayres, 56 Ga. 230 (1876); Vawter v. Ohio, etc. R. R., 14 Ind. 174 (1860); Spear v. Crawford, 14 Wend. 20 (1835); Chester Glass Co. v. Dewey, 16 Mass. 94 (1819); Fulgam v. Macon, etc. R. R., 44 Ga. 597 (1872); Minnesota Harvester Works v. Libby, 24 Minn. 327 (1877); Blyth's Case, L. R. 4 Ch. D. 140 (1876); Agricultural Bank v. Burr, 24 Me. 256 (1844); Hawley v. Upton, 102 U. S. 314 (1880); Wheeler v. Millar, 90 N. Y. 353 (1882), *aff'g* 24 Hun, 541; Wemple v. St. Louis, etc. R. R., 120 Ill. 196 (1887). A tender of a certificate of stock is unnecessary, except where the stock is sold on an executory contract, instead of being subscribed for. Kohlmetz v. Calkins, 16 N. Y. App. Div. 518 (1897). The case of Clark v. Continental Imp. Co., 57 Ind. 135 (1877), holds that, where the action is for the whole subscription or the last instalments, a tender of the certificate, on condition of payment, is necessary. St. Paul, etc. R. R. v. Robbins, 23 Minn. 439 (1877), holds that a tender is necessary where the issue is of preferred stock, after the whole original capital stock has been issued. Where a subscriber has tendered his subscription and demanded a certificate and is refused, a receiver cannot, upon insolvency of the company, hold him liable. Potts v. Wallace, 32 Fed. Rep. 272 (1887). A certificate of stock need not be tendered before suit is brought. Webb v. Baltimore, etc. R. R., 77 Md. 92 (1893); Astoria, etc. R. R. v. Hill, 20 Oreg. 177 (1890); California, etc. Co. v. Calender, 94 Cal. 120 (1892); Columbia Electric Co. v. Dixon, 46 Minn. 463 (1891); Dallas, etc. Mills v. Clancey, 15 S. W. Rep. 194 (Tex., 1891); Marson v. Deither, 49 Minn. 423 (1892). A subscriber to the increased capital stock who has actually paid part of the price cannot recover back the money upon the corporate insolvency on the ground that no certificate was issued. Pacific Nat. Bank v. Eaton, 141 U. S. 227 (1891); Thayer v. Butler, 141 U. S. 234 (1891); Butler v. Eaton, 141 U. S.

if the certificates were never issued at all.¹ Consequently, since it is for him to demand the certificate when he wishes it, and not for the corporation to tender it, it is no defense for him to allege that he has never received the paper representative of his stock. The corporation must, however, be in a position to issue such certificate.² If certificates for the whole capital stock have already been issued, the defendant subscriber, by this fact, may defeat the action to collect his subscription.³ It has also been held that the plaintiff corporation must aver a readiness and willingness to deliver the certificate of stock.⁴ The duty of a corporation to issue certificates of stock is considered elsewhere.⁵

§ 193. *Set-off and counter-claim.*—It seems to be well established that, when a corporation has become insolvent, and the subscriptions for stock are being enforced for the benefit of corporate creditors, a subscriber cannot, in the suit brought to collect his subscription, set up a counter-claim or set-off.⁶ This

240 (1891). A consolidated company claiming a subscription made to one of the constituent companies must prove a tender of the stock. *Pope v. Lake County*, 51 Fed. Rep. 769 (1892). A corporation cannot be compelled by the subscriber for stock to issue a certificate therefor before it has been fully paid up, the stock being a part of the increased capital stock. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893). The issue of certificates of stock is not necessary to render the subscriber liable. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

¹ *Fulgam v. Macon, etc. R. R.*, 44 Ga. 597 (1872). The issuing of a certificate is not necessary to constitute stockholdership. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890).

² *McCord v. Ohio, etc. R. R.*, 13 Ind. 220 (1859). The subscriber may compel the corporation to issue a certificate to him. *Buffalo, etc. R. R. v. Dudley*, 14 N. Y. 336, 347 (1856); *Mitchell v. Beckman*, 64 Cal. 117 (1883).

³ *Burrows v. Smith*, 10 N. Y. 550 (1853). See also § 58, *supra*. Quoted

and approved in *Knoxville, etc. R. R. v. Mayor*, 37 S. W. Rep. 883, 886 (Tenn., 1896).

⁴ *James v. Cincinnati, etc. R. R.*, 2 Disney (Ohio), 261 (1858). The corporation, in suing for the subscription, should allege a readiness and willingness to deliver the certificates of stock upon payment. *Walter, etc. Co. v. Jefferson*, 57 Minn. 456 (1894).

⁵ See § 61, *supra*. It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893).

⁶ *Handley v. Stutz*, 139 U. S. 417 (1891); *Sawyer v. Hoag*, 17 Wall. 610 (1873); *Shickle v. Watts*, 94 Mo. 410

rule is founded in equity and wise public policy. The stockholder is not deprived of his remedy for the debt due him from the corporation; but he is obliged to proceed in the same man-

(1888); *Government, etc. Co. v. Dempsey*, 50 L. J. (Q. B.) 199 (1881). Quoted and approved in *Indiana, etc. Co. v. McGill*, 15 Ind. App. 1 (1896), holding, however, that money due to a subscriber by the contract under which the stock was issued may be offset. The leading case in England on this subject is *Grissell's Case*, L. R. 1 Ch. App. 528 (1866), where the court said: "If a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts." See also *Black's Case*, L. R. 8 Ch. App. 254 (1872); *Gill's Case*, L. R. 12 Ch. D. 755 (1879); *Calisher's Case*, L. R. 5 Eq. 214 (1868); *Barnett's Case*, L. R. 19 Eq. 449 (1875); *Re Whitehouse*, L. R. 9 Ch. D. 595 (1878), disapproving *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175 (1868). See also *Matthews v. Albert*, 24 Md. 527 (1866). *Garnet, etc. Min. Co. v. Sutton*, 3 B. & S. 321 (1862), allowing set-off, was based on a statute repealed by Companies Act, 1862. See *Hillier v. Allegheny Mut. Ins. Co.*, 3 Pa. St. 470 (1846); *Long v. Penn. Ins. Co.*, 6 Pa. St. 421 (1847). Cf. *Scammon v. Kimball*, 92 U. S. 362 (1875); *Osgood v. Ogden*, 4 Keyes, 70 (1868); *Lawrence v. Nelson*, 21 N. Y. 158 (1860).

A subscriber cannot set off against his unpaid subscription a judgment lien where there are prior liens which would take the money due on his subscription if he should first pay it in. Nor, on the other hand, if there are other debts of the company, will the obligation of the company to the stockholders be canceled by the company's offsetting the subscription against the debt, unless the subscriber is insolvent. *Gilchrist v. Helena, etc. R. R.*, 49 Fed. Rep. 519 (1892);

Boulton Carbon Co. v. Mills, 78 Iowa, 460 (1889). In this case the learned court refers to § 227*d* (1st ed.) of this work, and dissents from the statement of law laid down herein. It will be noticed, however, that § 227*d* stated the law as to set-off in cases of *statutory* liability of stockholders. The right of set-off in cases of *subscription* liability of stockholders is stated in this work in § 193, *supra*, and the law as there laid down agrees with the decision in the above case—a case of subscription liability. Where set-off is a good defense to the action of a creditor who is also a stockholder and is liable, it is a good defense as against the assignee of his claim. *Callanan v. Windsor*, 78 Iowa, 193 (1889). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. *Burns v. Beck, etc. Co.*, 83 Ga. 471 (1889). A set-off is not allowed. *Hoby v. Birch*, 62 L. T. Rep. 404 (1890), reviewing the various contradictory decisions. No set-off is allowed as regards subscription liability. *Tama Water-Power Co. v. Hopkins*, 79 Iowa, 653 (1890). In a suit in equity by a receiver against all the stockholders, individual stockholders cannot plead in set-off debts due from the corporation. *Bausman v. Kinnear*, 79 Fed. Rep. 172 (1897); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892). In *Scovill v. Thayer*, 105 U. S. 143, 152 (1881), the court said: "It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation in a suit by an assignee in bankruptcy." To same effect, *Thebus v. Smiley*, 110 Ill. 316 (1884); *Williams*

ner, and is allowed to participate in the final corporate assets to the same extent and at the same time as other creditors.¹

Where, however, payment of a subscription is demanded or enforced for the benefit of the corporation itself, and not for corporate creditors, it is competent for the subscriber to set up, in defense of the action, a set-off or counter-claim.²

§ 194. In New York it has been established that, where a corporate creditor brings an action at law to enforce an unpaid subscription, the subscriber may set up, in defense to the action, a set-off or counter-claim consisting of a debt due from the corporation to him, but that such a defense is not allowable in a suit in equity.³ The distinction is based on the fact that a general accounting of all corporate debts and assets is possible by the latter remedy, but is impossible in the action at law.⁴

v. Traphagen, 38 N. J. Eq. 57 (1884). Payment of subscriptions in advance of calls, by turning in a debt thereon, is not payment upon corporate insolvency and winding-up. *Kent's Case*, L. R. 37 Ch. D. 508; S. C., L. R. 39 Ch. D. 259 (1888). *Cf. Healey, Law & Pr. of Companies* (3d ed.), 129, 130, 611, 834-836. Creditors who are stockholders cannot claim any part of the assets until their unpaid subscription is paid, but may claim their part before it is certain that any of the statutory liability will be required. *Schlaudecker's Appeal*, 14 Atl. Rep. 229 (Pa., 1888). A counter-claim which the company had, but which has been adjudicated against it, cannot be set up by stockholders when they are sued on their subscriptions. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417. A subscriber sued on his subscription may set off a debt due from the company to him. *Appleton v. Turnbull*, 84 Me. 72 (1891). Set-off of a debt by defendant against the corporate creditor is good, even in an equitable suit, if only one creditor has come into the suit. *Washington Sav. Bank v. Butchers', etc. Bank*, 130 Mo. 155 (1895). Concerning set-off

as against the *statutory* liability of stockholders, see § 225, *infra*.

¹ *Grissell's Case*, L. R. 1 Ch. App. 528 (1866). *Cf. Long v. Penn Ins. Co.*, 6 Pa. St. 421 (1847).

² *Barnett's Case*, L. R. 19 Eq. 449 (1875); *Bausman v. Denny*, 73 Fed. Rep. 69 (1896). Where a corporate creditor is suing the corporation, a stockholder cannot intervene in a suit and set up a counter-claim or set-off due from such corporate creditor to such intervening stockholder. *Gallagher v. Germania Brewing Co.*, 53 Minn. 214 (1893).

³ *Richards v. Kinsley*, 14 Daly (N. Y.), 334 (1887), where the rule is clearly laid down; also, *Christensen v. Colby*, 43 Hun, 362 (1887). In both of these cases the rule is based on analogous decisions in regard to the stockholder's statutory liabilities. See § 225, *infra*.

⁴ *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 382 (1848). In *Wheeler v. Millar*, 90 N. Y. 353 (1882), the stockholder's subscription and statutory liability combined were sufficient to pay his own and the other debts involved in the case. See *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. C.) 225 (1851); *Grose v. Hilt*, 36 Me. 22 (1853); *Whit-*

§ 195. *Statute of limitations*.—After a call has been made, and the subscription or a part of the subscription is thereby rendered due and payable, the statute of limitations begins to run. Difficulty, however, arises in determining whether the statute begins to run before the call is made. In Pennsylvania there formerly was an inclination to hold that the call must be made before six years have elapsed after the call is possible; otherwise the right of collection is barred.¹ But the better rule, and the one supported by the weight of authority, is that the statute of limitations begins to run on a subscription for stock only after a call has been made and is due.² It has been

man v. Porter, 107 Mass. 522 (1871), a joint-stock company case; Poole's Case, L. R. 9 Ch. D. 322 (1878). Cf. Eastman v. Crosby, 90 Mass. 206 (1864).

¹McCully v. Pittsburgh, etc. R. R., 32 Pa. St. 25 (1858); Pittsburgh, etc. R. R. v. Byers, 32 Pa. St. 22 (1858); Pittsburgh, etc. R. R. v. Graham, 36 Pa. St. 77 (1859); Shackamaxon Bank v. Disston, 2 R'y & Corp. L. J. 62 (Pa., 1887). Cf. Pittsburgh, etc. R. R. v. Plummer, 37 Pa. St. 413 (1860). A contrary rule seems to have been followed in Mack's Appeal, 7 Atl. Rep. 481 (1886). And it is now held in Pennsylvania that the statute of limitations runs against an unpaid subscription from the date of the assignment by the corporation for the benefit of creditors, and not from the time of a call. Franklin Sav. Bank v. Bridges, 8 Atl. Rep. 611 (Pa., 1887). Cf. Allibone v. Hager, 46 Pa. St. 48 (1863), where a plea of the statute of limitations in a suit for unpaid subscriptions was not allowed, because by statute the liability of stockholders continued until the whole capital was paid in. In Shackamaxon Bank v. Dougherty, 20 W. N. Cas. 297 (1887), it was held that a mere delay of six years in making calls barred all recovery, and obviously the bar of the statute was applied when no action was brought for six years after assessment made, or six years after the

corporation assigned for the benefit of its creditors. The statute of limitations begins to run when the subscription is made, even though a call is not made until long afterwards. Great Western Tel. Co. v. Purdy, 83 Iowa, 430 (1891). A decision of a state court that the statute of limitations runs against a subscription from the time that the subscription is made does not involve any federal question. Great Western Tel. Co. v. Purdy, 162 U. S. 329 (1896), applying the Iowa statute of limitations. See also § 189, *supra*.

²The statute of limitations runs only from the time of a call. Glenn v. Marbury, 145 U. S. 499 (1892); Hawkins v. Glenn, 131 U. S. 319 (1889); Glenn v. Liggett, 135 U. S. 533 (1890); Semple v. Glenn, 91 Ala. 245 (1891); Lehman v. Glenn, 87 Ala. 618 (1889); Glenn v. Priest, 48 Fed. Rep. 19 (1891); Priest v. Glenn, 51 Fed. Rep. 405 (1892). The four years' statute of limitations in Nebraska begins to run against an assessment of the comptroller on national-bank stock from the time the assessment is due, and the same length of time will be a bar to a suit in equity even as against the party who transferred the stock to an irresponsible person in order to avoid liability. Thompson v. German Ins. Co., 77 Fed. Rep. 258 (1896). Where by statute the as-

held that where the statute is a bar against the corporation it is a bar against corporate creditors.¹ But a more just rule prevails in New York, to the effect that, inasmuch as the corporate creditor's right to enforce the unpaid subscription accrues only

signor is liable, the statute of limitations does not commence to run until there has been a call. *Priest v. Glenn*, 51 Fed. Rep. 400 (1892); *Taggart v. Western Md. R. R.*, 24 Md. 563 (1866); *Western R. R. v. Avery*, 64 N. C. 491 (1870); *Glenn v. Williams*, 60 Md. 93 (1882); Baltimore, etc. Turnp. Co. v. Barnes, 6 H. & J. (Md.) 57 (1823); *Salisbury v. Black's Adm'r*, 6 H. & J. (Md.) 293 (1825), where, however, no call was necessary; *Curry v. Woodward*, 53 Ala. 371 (1875); *Glenn v. Soule*, 22 Fed. Rep. 417 (1884); *Glenn v. Foote*, 36 Fed. Rep. 824 (1888); *Great Western Tel. Co. v. Gray*, 122 Ill. 630 (1887). Cf. § 225, *infra*; *Glenn v. Howard*, 81 Ga. 383 (1889). If a subscription is conditional, the statute of limitations runs only from the time of performance. *Cornell's Appeal*, 114 Pa. St. 153 (1886). Merely authorizing a receiver to collect subscriptions, held not a call sufficient to set the statute of limitations running. *Glenn v. Macon*, 32 Fed. Rep. 7 (1887). Where the statute prescribes that the receiver shall collect subscriptions at once, the statute of limitations begins to run as soon as he is appointed. *Webber v. Hovey*, 65 N. W. Rep. 619 (Mich., 1895). The statute of limitations begins to run on unpaid subscriptions from the dissolution of the corporation. *Garesché v. Lewis*, 93 Mo. 197 (1887). Statute of limitations runs against unpaid subscriptions only from the time of a call by the court, not from the time of an assignment to a trustee. *Vanderwerken v. Glenn*, 85 Va. 9 (1888); *Lewis v. Glenn*, 84 Va. 947 (1888). The state statute of limitations as to executors and estates will be applied by the federal courts to suits by a receiver

for the enforcement of a stockholder's liability in a national bank. *Butler v. Poole*, 44 Fed. Rep. 586 (1890). Although the statute of limitations bars the action by the creditor against the corporation, yet if a lien exists by trust deed, the debt may be enforced against unpaid subscriptions. *Hambleton v. Glenn*, 9 S. E. Rep. 129 (Va., 1889). If the stockholder is a non-resident the statute of limitations does not run. *Tama, etc. Co. v. Hopkins*, 79 Iowa, 653 (1890). The statute of limitations is no bar. *Lehman v. Glenn*, 87 Ala. 618 (1889). The statute of limitations begins to run in favor of stockholders against the creditor's debt at the same time it commences to run in favor of the company, even though the company is sued before the statute is a bar as to it. The statute runs against the liability of subscribers from the time of the subscription, where no call is made before the statute becomes a bar. *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891). The statute of limitations does not begin to run as against creditors until they have exhausted their remedy against the company, and have established the amount due from the stockholders and necessary to pay the debt. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892). The statute of limitations begins to run only from the date of a call, even though long prior thereto the defendant said he would not take his stock. *Re Haggart, etc. Co.*, 19 App. Rep. (Can.) 582 (1892).

¹ *Stilphen v. Ware*, 45 Cal. 110 (1872); *Davidson v. Rankin*, 34 Cal. 503 (1868), in probate matters; *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 171, 242,

after judgment against the corporation is obtained, the statute of limitations runs only from the date of such judgment.¹ Courts of equity will generally apply the same period of limitation, unless there be special and equitable reasons for doing otherwise.² Where a subscriber defeats even a part of the action on his subscription by setting up the statute of limitations, he cannot claim the stock, at least unless he pays the part which was barred by the statute.³ Liability on stock is-

291, 293 (1885); *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. (S. C.) 227 (1854); *First Nat. Bank v. Greene*, 64 Iowa, 415 (1884). The statute applicable to written contracts applies, although the subscription is partly in writing. *Falmouth, etc. Co. v. Shawhan*, 107 Ind. 47 (1886). It is well to suggest here that the creditor, before enforcing this liability, must first obtain judgment against the corporation. See § 200, *infra*. The corporation can defeat the action against it by setting up the statute of limitations, if sufficient time has elapsed. If the corporation fails to set up that defense, the stockholder may set it up in behalf of the corporation when he is sued. Such, at least, is the rule in some jurisdictions. See § 209, *infra*. The statute of limitations, by commencing to run against one call, does not thereby commence to run against the whole subscription. *Dorsheimer v. Glenn*, 51 Fed. Rep. 404 (1892); *Priest v. Glenn*, 51 Fed. Rep. 405 (1892).

¹ *Christensen v. Quintard*, 36 Hun, 334 (1885); *Christensen v. Colby*, 43 Hun, 362 (1887). See also § 225, *infra*, notes. *Cf. Williams v. Taylor*, 120 N. Y. 244 (1890), rev'g *Williams v. Meyer*, 41 Hun, 545, involving a sale of treasury stock. 53 Pac. Rep. 959.

² *Bank of United States v. Dallam*, 4 Dana (Ky.), 574 (1836). In *Payne v. Bullard*, 23 Miss. 88 (1851), and *Hightower v. Thornton*, 8 Ga. 486 (1850), however, it was held that the statute of limitations has no application by

analogy to the equitable actions to collect subscriptions. In *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777 (1884), the court said, in a similar case: "In adjusting equitable rights, courts of equity will never allow the statute of limitations to have a manifestly inequitable and unjust operation." In *Scovill v. Thayer*, 105 U. S. 143, 155 (1881), a case in equity, the court said: "Before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand;" citing cases. A decree of a court of equity that the subscription be paid is equivalent to a call, and the statute commences to run. *Glenn v. Saxton*, 68 Cal. 353 (1886). An assignment by the corporation for the benefit of creditors starts the statute within a reasonable time thereafter. *Glenn v. Dorsheimer*, 24 Fed. Rep. 536 (1885); *Glenn v. Priest*, 28 Fed. Rep. 907 (1886). For an explanation of the origin of the Glenn cases, see *Baltimore, etc. R. R. v. Glenn*, 28 Md. 287 (1867). Where a decree is made assessing the stockholders on their subscriptions, the statute of limitations begins to run from the entry of the decree. *Glenn v. McAllister*, 46 Fed. Rep. 883 (1891).

³ *Johnson v. Albany, etc. R. R.*, 54

sued for property at an overvaluation commences only upon insolvency of the corporation. Hence the statute of limitations runs from that date.¹

§ 196. *Ignorance or mistake.*—It is no defense to an action for a subscription that the subscriber at the time of subscribing was ignorant of the actual condition of the corporation.² Nor is it a defense that he was ignorant of the legal effect of the subscription contract which he signed.³

§ 197. *Miscellaneous defenses—Change in the contract.*—A subscriber cannot defeat an action for the collection of his subscription by alleging that the charter was obtained in bad faith;⁴ or that, where a corporate creditor is enforcing payment, such creditor is also a director of the corporation;⁵ or that other subscribers have paid their subscriptions in Confederate money;⁶ or that he has paid the subscription by note instead of by cash, as required by the charter;⁷ or that the promoters sold to the corporation a patent-right at an overvaluation;⁸ or that the officers were illegally elected;⁹ or that an illegal by-law prevents his voting until calls are paid;¹⁰ or that, by the charter, the whole capital stock should have been paid in before the commencement of business, which was not done;¹¹ or that the corporation has been ousted from its franchises;¹² or that the plaintiff is only an assignee of the com-

N. Y. 416, 426 (1873), where the court said: "The claim of the plaintiff is not supported by any principle that should give it any consideration in either a court of law or equity. The statute of limitations never paid a debt, although it barred a remedy."

¹ Jones v. Whitworth, 94 Tenn. 602 (1895), holding also that the time may be shorter as to deceased stockholders.

² Payson v. Withers, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29.

³ New Albany, etc. R. R. v. Fields, 10 Ind. 187 (1858); Clem v. Newcastle, etc. R. R., 9 Ind. 488 (1857). See also cases in §§ 53, 146, *supra*.

⁴ Garrett v. Dillsburg, etc. R. R., 78 Pa. St. 465 (1875); Smith v. Heidecker, 39 Mo. 157 (1866). Or illegally

changed. Psychaud v. Lane, 24 La. Ann. 404 (1872).

⁵ Chouteau Ins. Co. v. Floyd, 74 Mo. 286 (1881).

⁶ Macon, etc. R. R. v. Vason, 57 Ga. 314 (1876).

⁷ Little v. O'Brien, 9 Mass. 423 (1812).

⁸ Dorris v. French, 4 Hun, 292 (1875). See also ch. III and notes.

⁹ Vernon Soc. v. Hills, 6 Cow. 23 (1826). See also § 110, *supra*. It is no defense that the trustees were not stockholders, as required by statute. Ross v. Bank of Gold Hill, 20 Nev. 191 (1888).

¹⁰ Chandler v. Northern Cross R. R., 18 Ill. 190 (1856).

¹¹ McDermott v. Donegan, 44 Mo. 85 (1869).

¹² Gaff v. Flesher, 33 Ohio St. 107

pany's rights.¹ A material alteration, however, in a subscription contract is a good defense, unless the corporation proves it to have been made without its knowledge or procurement.² The defenses that the corporate charter has been amended by the legislature without the consent of the defendant subscriber;³ that an assignee of the corporation has the sole right, as a general rule, to collect subscriptions;⁴ that the stockholder did not know the legal effect of his subscription;⁵ and that the charter differs from the terms of the subscription contract,—are considered elsewhere.⁶ Various other defenses are referred to in the note below.⁷

(1877); *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269 (1882).

¹ See ch. VII, *supra*.

² *Berry v. Marietta, etc. R'y*, 26 Ohio St. 673 (1875). *Cf. Ellison v. Mobile, etc. R. R.*, 36 Miss. 572 (1858). See also § 62, *supra*.

³ See ch. XXVIII, *infra*.

⁴ See § 111, *supra*, and § 852, *infra*.

⁵ See § 146, *supra*.

⁶ See § 502, note, *infra*, and ch. IX.

⁷ Change of name is no defense. *Howard v. Glenn*, 85 Ga. 238 (1890). A change of name during organization is no defense. *Priest v. Glenn*, 51 Fed. Rep. 400 (1892). A slight change in the name as incorporated is no defense. *Joseph v. Davis*, 10 S. Rep. 830 (Ala., 1892). A slight change in the name is no defense where the subscriber has already paid assessments. *McCormick v. Great Bend, etc. Co.*, 48 Kan. 614 (1892). An increase of the capital stock as allowed by the charter does not release subscribers. *Port Edwards, etc. R'y v. Arpin*, 80 Wis. 214 (1891). It is no defense to a subscription that the subscriber did not read the paper. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, 189 U. S. 417. Although a corporation has taken more subscriptions than its capital stock and has issued certificates therefor, yet this does not release subscribers up to the correct

amount. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). It is no defense to a railroad stock subscription that defendant was to receive stock in a construction company, or that the control would not change hands, or that the company has sold all its property. *Russell v. Alabama Midland R'y*, 94 Ga. 510 (1894). It is no defense that a greater capital stock is provided for in the charter than in the preliminary agreement, nor that the subscriptions have not all been paid in, where the defendant acquiesced in all this by attending meetings and voting. *International, etc. Assoc. v. Walker*, 83 Mich. 386 (1890). A subscription to stock is enforceable severally although signed by several. A change in it by several of the subscribers does not release the others. An increase in the capital upon incorporation does not release. *Gibbons v. Grinsel*, 79 Wis. 365 (1891). A sale under statutes existing at the time of subscription is valid and does not release the subscriber. *Armstrong v. Karshner*, 47 Ohio St. 276 (1890). A person who has been discharged under the bankrupt act is not liable on subscriptions made previous to his application in bankruptcy. *Glenn v. Abell*, 39 Fed. Rep. 10 (1889); but see *Sayre v. Glenn*, 87 Ala. 631 (1889). A discharge in bankruptcy of a subscriber for stock is a

§ 198. *Waiver of defenses*.—A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be express, or it may arise by implication from the acts and declarations of the subscriber. Thus, taking part in corporate meetings,¹ or the payment of a call, with full knowledge of the defense, are held to be a waiver;² and any act indicating a clear intent to abide by or accept or pass over an objection which the subscriber might make will be held to be a waiver.³

bar to a suit to enforce the subscription where the company became insolvent before such bankruptcy. *Carey v. Mayer*, 79 Fed. Rep. 926 (1897).

¹ *Kampmann v. Tarver*, 29 S. W. Rep. 1144 (Tex., 1895). The court may submit to the jury whether the defendant knew that the whole capital stock was not subscribed when he attended meetings and voted. *International, etc. Assoc. v. Walker*, 97 Mich. 159 (1893). A subscriber who takes part in the business of the company cannot defend on the ground that a statute had not been complied with in paying in twenty per cent in cash. *Canfield v. Gregory*, 66 Conn. 9 (1895).

² *Mississippi, etc. R. R. v. Harris*, 36 Miss. 17 (1858); *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568 (1885); *Hamilton v. Grangers', etc. Ins. Co.*, 67 Ga. 145 (1881). A subscriber by taking part in the organization and paying part of the subscription waives objections to the irregular incorporation of the company. *Greenbrier, etc. Exp. v. Squires*, 40 W. Va. 307 (1895). A payment of a call on a subscription is not a waiver of the defense that the corporation has been formed for different purposes than were repre-

sented by the promoters at the time of the subscription, where the subscriber did not know that fact when he paid. *Strong v. Southwestern, etc. Co.*, 38 S. W. Rep. 546 (Tex., 1896). Partial payment of the subscription in ignorance of the fact that one of the other subscribers was incompetent to subscribe is not a waiver of the defense. *Denny Hotel Co. v. Gilmore*, 6 Wash. 152 (1893). The complaint need not allege that the full actual stock has been subscribed, where it alleges that the subscriber had paid several instalments and had received a dividend. *Duluth Inv. Co. v. De Witt*, 63 Minn. 538 (1896).

³ See *May v. Memphis Branch R. R.*, 48 Ga. 109 (1873); *Middlesex Turnp. Corp. v. Swan*, 10 Mass. 384 (1813); *McCully v. Pittsburgh, etc. R. R.*, 32 Pa. St. 25 (1858). Participating in benefits with knowledge is a waiver. *Detroit, etc. Club v. Fitzgerald*, 67 N. W. Rep. 899 (Mich., 1896). The defense that the full capital stock has not been subscribed may be waived, and where the treasurer collects from others he cannot set up such defense himself. *Macfarland v. West Side Imp. Assoc.*, 73 N. W. Rep. 736 (Neb., 1898). See also §§ 160, 161, *supra*, and ch. XLIV.

CHAPTER XI.

THE STOCKHOLDERS' LIABILITY TO CORPORATE CREDITORS UPON UNPAID SUBSCRIPTIONS.

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| <p>§ 199. Unpaid subscriptions a fund for the benefit of creditors—Construction of the liability.</p> <p>200. Can be reached only after judgment against the corporation, and execution returned unsatisfied.</p> <p>201. The remedy by garnishment or attachment, or by notice to the stockholder.</p> <p>202. The remedy by <i>mandamus</i>.</p> <p>203. The remedy by action at law.</p> <p>204. The remedy by bill in equity.</p> <p>205, 206. Parties to the bill in equity.</p> | <p>§ 207. A court of equity may make a call.</p> <p>208. Receivers and assignees in bankruptcy or for the benefit of creditors—Their duties, powers, and liabilities as to shares not paid up.</p> <p>209. The judgment against the corporation impeachable only for fraud or want of jurisdiction.</p> <p>210. Defenses available against corporate creditors in actions to compel payment of balances of subscriptions.</p> <p>211. Contribution.</p> |
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§ 199. *Unpaid subscriptions a fund for the benefit of creditors—Construction of the liability.*—The capital or capital stock of a corporation is the aggregate of the par value of all the shares into which the capital is divided upon the incorporation; it is the fund or resource with which the corporation is enabled to act and transact its business, and upon the faith of which persons give credit to the corporation and become corporate creditors. The public, in dealing with a corporation, assumes that its actual capital, in money or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has a right to assume that the capital stock has been or will be fully paid up, if it be necessary in order to meet corporate liabilities. Accordingly, the American courts go very far to protect corporate creditors; and in this country it is a well-settled doctrine that capital stock, and especially unpaid subscriptions to the capital stock, constitute a fund for the benefit of the creditors of the corporation.¹ There are three methods by which stock-

¹ "Though it be a doctrine of modern date," says Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 610, 620 (1873), "we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the

holders seek to avoid their liability to corporate creditors: first, by a cancellation or withdrawal from the contract;¹ second, by a release from their obligation to pay the full par value of the stock;² third, by a transfer of the stock.³ In each of these cases, however, a court of equity does its utmost to protect the corporate creditors, and a rigid scrutiny will be made in the interest of creditors into every transaction of such a nature.⁴

corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." This seems to be a distinctively American doctrine. It is not known to the English law, and was first clearly announced by Mr. Justice Story in *Wood v. Dummer*, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435. See also the cases of *Hightower v. Thornton*, 8 Ga. 486 (1850); *Germantown Pass. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Crawford v. Rohrer*, 59 Md. 599 (1882); *Lewis v. Robertson*, 21 Miss. 558 (1850); *Bunn's Appeal*, 105 Pa. St. 49 (1884); *Curran v. Arkansas*, 15 How. 304 (1853); *Mumma v. Potomac Co.*, 8 Pet. 281 (1834); *Sanger v. Upton*, 91 U. S. 56 (1875); *Morgan County v. Allen*, 103 U. S. 498 (1880); *Osgood v. Laytin*, 3 Keyes (N. Y.), 521 (1867); S. C., 5 Abb. Pr. (N. S.) 1. Cf. *Vose v. Grant*, 15 Mass. 505 (1819); *Spear v. Grant*, 16 Mass. 9 (1819); *Baker v. Atlas Bank*, 50 Mass. 182 (1845); *Osgood v. King*, 42 Iowa, 478 (1876); *Chisholm v. Forny*, 65 Iowa, 333 (1884); *Jackson v. Traer*, 64 Iowa, 469 (1884). To the same effect, see *Gillet v. Moody*, 5 Barb. 185, 189 (1849); *Mills v. Stewart*, 41 N. Y. 384, 389 (1869); *Morgan v. New York, etc. R. R.*, 10 Paige, Ch. 290 (1843); *Salmon v. Hamborough Co.*, 1 Cas. in Ch. 204

(1871); *Nevitt v. Bank of Port Gibson*, 14 Miss. 513 (1846). As to the trust-fund theory, however, see § 9, *supra*.

¹ See §§ 167-170, *supra*.

² See §§ 167-170, and ch. III, *supra*.

³ See ch. XV, *supra*.

⁴ *Sawyer v. Hoag*, 17 Wall. 610 (1873); *Morgan County v. Allen*, 103 U. S. 498 (1880); *Chouteau v. Dean*, 7 Mo. App. 210 (1879); *Gill v. Balis*, 72 Mo. 424 (1880); *Putnam v. New Albany*, 4 Biss. 365 (Ind., 1869); S. C., 20 Fed. Cas. 79; *Re South Mountain, etc. Co.*, 7 Sawyer, 30 (Cal., 1881); S. C., 5 Fed. Rep. 403; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537 (1881); *Singer v. Given*, 61 Iowa, 93 (1883); *Jackson v. Traer*, 64 Iowa, 469 (1884); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892); *Chisholm v. Forny*, 65 Iowa, 333 (1884). In one case it is said that it is not within the ingenuity of man to devise a scheme to prevent courts of equity from enforcing the payment of unpaid subscriptions to capital stock for the benefit of corporate creditors. *Upton v. Hansbrough*, 3 Biss. 417, 425 (1873); S. C., 28 Fed. Cas. 839. Unfortunately this cannot be said to be always the result of corporate creditors' suits to enforce such liability. But the courts do their utmost to give relief. Thus, an arrangement entered into between the corporation and its stockholders, for the purpose of defeating the claims of creditors, in pursuance of which the stockholders are allowed, after it is ascertained that the corporation is insolvent, to buy in depreciated and repudiated claims against the com-

In construing the liability of stockholders on an unpaid subscription, the court will follow the decisions of the state which created the corporation.¹

§ 200. *Can be reached only after judgment against the corporation and execution returned unsatisfied.*—Although it may be considered settled law, at least in the United States, that unpaid subscriptions to the capital stock of corporations constitute a trust fund for the benefit of corporate creditors, yet such unpaid balances of subscription are not the primary or regular fund for the payment of corporate debts. Persons transacting business with the corporation look to the corpora-

pany, and thus to extinguish their indebtedness for stock subscribed, is held fraudulent and void. *Goodwin v. McGehee*, 15 Ala. 232 (1849); *Thompson v. Meisser*, 108 Ill. 359 (1884). And a payment in full for stock, followed by an immediate loan of part or all of the purchase price by the corporation back to the subscriber, is a fraud as to creditors and the public, and will be set aside. *Sawyer v. Hoag*, 17 Wall. 610 (1873). A fraudulent device by which a stockholder pays his subscription by a note, and subsequently obtains the note at a large discount, may be valid as against the company, but will be set aside as regards corporate creditors. *Bouton v. Dement*, 123 Ill. 142 (1887). A subscriber cannot pay for his stock by purchasing full-paid stock and having this substituted for his subscription. *Marshall Foundry Co. v. Killian*, 99 N. C. 501 (1888). The stockholder's liability in this respect is not confined in general to the original capital stock, but it attaches, upon an authorized increase of the capital, to such increase. *Chubb v. Upton*, 95 U. S. 665 (1877). See also *Veeder v. Mudgett*, 95 N. Y. 295 (1884); *Delano v. Butler* (Pacific Nat. Bank Cases), 118 U. S. 634 (1886). The filing of the statutory certificate declaring that the whole amount of the capital stock has been paid in is

not conclusive of the fact, and will not prevent proof to the contrary. *Barre Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563 (1879); *Wheeler v. Millar*, 90 N. Y. 353 (1882); *Veeder v. Mudgett*, 95 N. Y. 295 (1884); *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 171, 242, 291, 293 (1885). The question whether a stockholder may limit or entirely do away with his liability, by an express contract to that effect with corporate creditors, is considered elsewhere. See § 216, *infra*.

¹ *Glenn v. Liggett*, 135 U. S. 533 (1890). See also § 223, *infra*. The supreme court of the United States will not reverse a judgment of the court of appeals of New York, although the court of appeals, in passing upon the liability of stockholders, refused to follow the law of Virginia, where the corporation had been incorporated, the stockholders against whom suit was brought being residents of New York. *Glenn v. Garth*, 147 U. S. 360 (1893). Subscribers to stock are liable according to the law of the state incorporating the company, and not according to the law of the state where the subscribers reside. A subscriber to stock in a Virginia corporation is liable by statute although he has transferred his stock. *Morris v. Glenn*, 87 Ala. 628 (1888).

tion itself for the payment of their debts. Credit is given to the corporation, not to the stockholders; and it is the natural order of business that the creditors of the corporation are to be paid by the corporation from funds in the corporate treasury. Ordinarily, corporate creditors have no knowledge or concern about the subscription list, and unpaid or partially paid subscriptions are a matter entirely between the corporation and the subscribers. So long as the corporation meets its obligations in the ordinary course of business, corporate creditors have no need to concern themselves about unpaid subscriptions to the stock. But when the corporation is in default and embarrassed, or for any reason fails to pay its debts, then its creditors have rights with reference to such unpaid subscriptions. They then have the right to know whether all the subscriptions for stock have been fully paid in, and, if not, they have the right to compel such payment.

It accordingly becomes important to know at what point, in their efforts to collect what is due them, corporate creditors may cease to pursue the corporation and proceed directly against its delinquent members. The well-established rule upon this point is that a corporate creditor's suit to enforce payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and an execution returned unsatisfied.¹ This rule is of such importance

¹Bank of United States v. Dallam, 4 Dana (Ky.), 574 (1836); Walser v. Seligman, 21 Blatchf. 130 (1882); Wetherbee v. Baker, 35 N. J. Eq. 501 (1882); Cutright v. Stanford, 81 Ill. 240 (1876); Baxter v. Moses, 77 Me. 465 (1885); Terry v. Anderson, 95 U. S. 628, 636 (1877); Cleveland v. Burnham, 55 Wis. 598 (1882); Freeland v. McCullough, 1 Denio, 414 (1845); Bayliss v. Swift, 40 Iowa, 648 (1875). The suit is to be brought for this purpose in the courts of the state where the corporation exists. Barclay v. Talman, 4 Edw. Ch. 123 (1842); Murray v. Vanderbilt, 39 Barb. 140, 147 (1863); Bank of Virginia v. Adams, 1 Pars. Eq. 534 (1850); Patterson v. Lynde, 112 Ill. 196 (1884); Harris v. Pullman, 84 Ill. 20, 25 (1876). See also § 219, *infra*. Cf. Claflin v. McDermott, 12 Fed. Rep. 375 (1882). Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain a seizure of their debtor's property and collect unpaid subscriptions and apply the same to the payment of their debts, even though they allege that an existing mortgage on the property is fraudulent, and that the company is insolvent, and a bill of foreclosure of the mortgage is going on. They might under certain conditions intervene. Hollins v. Brierfield Coal, etc. Co., 150 U. S. 371 (1893). The federal courts will not even follow a state statute

that, by statute, in many of the states, a creditor's right to proceed against a stockholder on his unpaid subscription is allowed only after the remedy against the corporation itself has been exhausted.¹ By this is meant that judgment shall have been duly recovered against the corporation, and execution issued and regularly returned unsatisfied. Nothing short of that exhausts the remedy against the corporation.²

This rule is founded in reason and a wise public policy relative to the transaction of business, since the corporate funds are the corporate creditors' primary resource, even where the liability of the individual shareholder is declared to be primary, like that of an original contractor or partner.³ Where, however, the corporation has been adjudged a bankrupt, and a dissolution has in this way been brought about, the remedy against the corporation need not first be exhausted.⁴ Such,

authorizing such a suit; nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditor's suit. *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371 (1893). The return of execution unsatisfied is necessary. *Albright v. Texas*, 46 Pac. Rep. 448 (N. M., 1896).

¹ *Thornton v. Lane*, 11 Ga. 459 (1852); *Lane v. Harris*, 16 Ga. 217 (1854); *McClaren v. Franciscus*, 43 Mo. 452 (1869); *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154 (1859); *Priest v. Essex Mfg. Co.*, 115 Mass. 380 (1874); *Cambridge Water-works v. Somerville Dyeing, etc. Co.*, 86 Mass. 239 (1862); *Lindsley v. Simonds*, 2 Abb. Pr. (N. S.) 69 (1866); *Blake v. Hinkle*, 10 Yerg. (Tenn.) 218 (1836); *Shelling-ton v. Howland*, 53 N. Y. 371 (1873); *Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871); *Dauchy v. Brown*, 24 Vt. 197 (1852); *Drinkwater v. Portland Marine R'y*, 18 Me. 35 (1841); *Handy v. Draper*, 89 N. Y. 334 (1882); *Burch v. Taylor*, 1 Wash. St. 245 (1890); *Baines v. Babcock*, 95 Cal. 581 (1891). Cf. *Perkins v. Church*, 31 Barb. 84 (1859).

² *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338 (1882).

In England a *scire facias* is a necessary preliminary, unless there is some statutory enactment to the contrary. *Bartlett v. Pentland*, 1 B. & Ad. 704 (1831); *Clowes v. Brettell*, 10 M. & W. 506 (1842); *Wingfield v. Barton*, 2 Dowl. (N. S.) 355 (1842); *Wingfield v. Peel*, 12 L. J. (N. S., Q. B.) 102 (1842). In a suit by a corporate creditor against a corporation to obtain judgment before suing stockholders on their liability, the stockholders are not allowed to come in as parties. *Hambleton v. Glenn*, 9 S. E. Rep. 129 (Va., 1889). Proof that a creditor has exhausted his legal remedy against the corporation is shown by the judgment and an execution thereon returned unsatisfied. Evidence that the company owns a large amount of personal property besides its road and franchise is inadmissible. *Baines v. Babcock*, 95 Cal. 581 (1891).

³ *Stone v. Wiggin*, 46 Mass. 316 (1842); *Stedman v. Eveleth*, 47 Mass. 114 (1843).

⁴ *State Savings Assoc. v. Kellogg*, 52 Mo. 583 (1873); *Dryden v. Kellogg*, 2 Mo. App. 87 (1876); *Shellington v. Howland*, 53 N. Y. 371 (1873). Cf. *Ansonia Brass, etc. Co. v. New Lamp*

also, has been held to be the rule where the corporation is notoriously insolvent,¹ or is formally dissolved.²

A bill in equity lies to enforce the subscription liability of a stockholder in a foreign corporation. No judgment against the corporation need be obtained in the state where such suit is brought, if judgment has been obtained and execution re-

Chimney Co., 53 N. Y. 123 (1873); *S. C. aff'd*, *New Lamp Chimney Co. v. Ansonia Brass, etc. Co.*, 91 U. S. 656 (1875); *Walser v. Seligman*, 21 Blatchf. 130 (1882). See § 219, *infra*. And see, *contra*, *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605 (1878); *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747 (1887).

¹ *Hodges v. Silver Hill Min. Co.*, 9 Oreg. 200 (1881); *Terry v. Tubman*, 92 U. S. 156 (1875); *Camden v. Doremus*, 3 How. 515, 533 (1845); *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417; *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah, 423 (1896). It has been held that the right of action accrues to the creditor whenever it is clear that the corporation has no property from which the claim can be paid. A judgment is not necessary for the *beginning* of an action against the stockholder, though it may be necessary as *evidence* in such action to determine the measure of damages. *First Nat. Bank v. Greene*, 64 Iowa, 445 (1884). *Cf. Cleveland v. Marine Bank*, 17 Wis. 545 (1863). A creditor of an insolvent corporation may bring a creditor's bill against the assignee for the benefit of creditors of a subscriber, even though no judgment against the corporation had been obtained, and no other stockholders are made co-defendants. *Samainego v. Stiles*, 20 Pac. Rep. 607 (Ariz., 1889).

² Approved in *Latimer v. Citizens' State Bank*, 71 N. W. Rep. 225 (Iowa, 1897); *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875). *Cf. Hollingshead v. Woodward*, 35 Hun, 410 (1885). As to what

is sufficient to dissolve a corporation for this purpose, see *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875). Under a statute requiring dissolution of the corporation before corporate creditors can reach unpaid subscriptions, the corporation is deemed to be dissolved when it has ceased to exercise its proper functions, is without funds, and is indebted. *Penniman v. Briggs*, 1 Hopk. Ch. 300 (1824); *Slee v. Bloom*, 19 Johns. 456 (1822); *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, 479 (1840). *Cf. Terry v. Anderson*, 95 U. S. 628 (1877). *Remington v. Samana Bay Co.*, 140 Mass. 494 (1886), holds that the judgment herein against the corporation is void if the corporation has been dissolved. It has been said that corporate creditors need not await the collection by the corporation of doubtful claims, but may compel the payment of their claims by the shareholders, and let the latter take the risk and delay. "Creditors," says the supreme court of Tennessee, "will not be required to wait the collection of doubtful claims or claims in litigation. The stockholders must pay promptly, and take upon themselves the onus of delay and risk as to all such claims." *Moses v. Ocoee Bank*, 1 Lea (Tenn.), 398, 413 (1878). See also *Stark v. Burke*, 9 La. Ann. 341, 343 (1854). General creditors may also reach unpaid subscriptions, although another corporate creditor has a mortgage lien on the corporate property, rights, privileges, and franchises. *Dean v. Biggs*, 25 Hun, 122 (1881). See also § 852, *infra*.

turned unsatisfied where the corporation exists, and it is shown that the company has no property and service cannot be made in the state upon the company.¹

§ 201. *The remedy by garnishment or attachment or by notice to the stockholder.*—There are various remedies which corporate creditors may employ to enforce the payment of partially paid up subscriptions. Among these is that of garnishment. Thus, where a subscription has been called in, in part or wholly, and has not been paid by the subscriber, it is, at least to the extent of such calls, an asset of the corporation, and, like other assets, is subject to garnishment at the instance of a corporate creditor.²

When, therefore, a stockholder is in default for instalments of stock for which calls have been made, he stands in the atti-

¹ Rule *v. Omega, etc. Co.*, 64 Minn. 326 (1896). Unless such proof is given, judgment in the state must be shown. *National Tube Works v. Ballou*, 146 U. S. 517 (1892); *S. C.*, 42 Fed. Rep. 749; *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338 (1882). In this case it is held that a proceeding *in rem*, affecting only the property of the corporation attached, and execution against that property, is not what the rule requires; and again, that the recovery of a judgment and issue of execution in another state is not a compliance with the rule, but that a judgment in and execution issued out of a court of the state where the statute is in force is necessary. To the same effect, see *Brice v. Munro*, 5 Can. Law T. 130, Ont. High Ct. of Just., Q. B. Div. (1885), in which case it is held that an execution issued and returned in Quebec is not sufficient as against a company incorporated and existing in Ontario. *Contra, Shickle v. Watts*, 94 Mo. 410 (1888). The subscription liability may be enforced in another state. *Latimer v. Citizens' State Bank*, 71 N. W. Rep. 225 (Iowa, 1897); *Sigua Iron Co. v. Brown*, 19 N. Y. App. Div. 143 (1897). See also §§ 219, 223, *infra*.

² *Kern v. Chicago, etc. Assoc.*, 140 Ill. 371 (1892); *Joseph v. Davis*, 10 S. Rep. 830 (Ala., 1892); *Meints v. East St. Louis, etc. Co.*, 89 Ill. 48 (1878); *Hannah v. Moberly Bank*, 67 Mo. 678 (1878); *Simpson v. Reynolds*, 71 Mo. 594 (1880); *Faul v. Alaska, etc. Min. Co.*, 8 Sawyer, 420 (1883); *Curry v. Woodward*, 53 Ala. 371 (1875); *Bingham v. Rushing*, 5 Ala. 403 (1843); *Hays v. Lycoming F. Ins. Co.*, 99 Pa. St. 621 (1882). *Cf. Rand v. White Mountains R. R.*, 40 N. H. 79 (1860); *Brown v. Union Ins. Co.*, 3 La. Ann. 177 (1848); *Scott v. Windham*, 73 Miss. 76 (1894); *Dean v. Biggs*, 25 Hun, 122 (1881). The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation. *Prentice v. U. S. etc. Steamship Co.*, 78 Fed. Rep. 106 (1897). An attachment of unpaid subscriptions due to a foreign corporation will be stayed where sequestration proceedings are commenced, but the priority of the attachment creditor will be preserved. *Re Queensland, etc. Co.*, 58 L. T. Rep. 878 (1888).

tude of any other debtor to the corporation, and may be garnished in the usual way, upon the theory of the authorities just cited, for the purpose of collecting the debt due from the corporation. But this remedy is not available to reach that part of the unpaid subscription for which calls have not been made.¹ The California courts will not enforce the subscription liability of stockholders in an Illinois corporation where the Illinois statutes prescribe that the remedy may be by garnishment.²

¹*Bingham v. Rushing*, 5 Ala. 403 (1843); *Brown v. Union Ins. Co.*, 3 La. Ann. 177 (1848); *Bunn's Appeal*, 105 Pa. St. 49 (1884). See also *Coalfield Co. v. Peck*, 98 Ill. 139 (1881). In Nevada the right of garnishment in a case where calls had not been made was expressly denied. *McKelvey v. Crockett*, 18 Nev. 238 (1884). *Cf. Meints v. East St. Louis, etc. Co.*, 89 Ill. 48 (1878); *Hughes v. Oregonian R'y*, 11 Oreg. 158 (1883); *Peterson v. Sinclair*, 83 Pa. St. 250 (1877); *Langford v. Ottumwa W. P. Co.*, 59 Iowa, 283 (1882); *Chandler v. Siddle*, 10 Nat. Bankr. Reg. 236 (1874); S. C., 5 Fed. Cas. 459. In New York there is no process of garnishment, but instead thereof an attachment is allowed. Under an attachment against a foreign corporation not chartered by the United States, the sheriff may levy upon the sums remaining unpaid upon a subscription to the capital stock of the corporation, the subscriber being within the county and having property therein; "or upon one or more shares of stock therein held by such a person, or transferred by him for the purpose of avoiding payment thereof." N. Y. Code Civ. Proc., § 646. 30 S. E. Rep. 348.

It has also been held that a corporate creditor, by an execution against the corporation, may reach an unpaid subscription, though no call has been made. *Re Glen Iron Works*, 17 Fed. Rep. 324 (1883); S. C., 20 Fed. Rep. 674 (1884); *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571 (1842). *Cf. Bunn's*

Appeal, 105 Pa. St. 49 (1884); and see *Hannah v. Moberly Bank*, 67 Mo. 678 (1878). But this is a somewhat questionable rule, and the remedy proposed by it is probably very seldom invoked. For the remedy in Pennsylvania, where by statute, after execution returned unsatisfied against the corporation, on order of the court, execution arises against the stockholders, see *Lauder v. Tillia*, 117 Pa. St. 304 (1887). *Bank of Virginia v. Adams*, 1 Pars. Sel. Cas. 534 (1850), holding that a court of equity in Pennsylvania has no jurisdiction to compel stockholders of a foreign corporation residing there to pay a subscription to its stock on the application of its creditors. A judgment against a non-resident stockholder served outside of the jurisdiction is not enforceable. *Wilson v. Seligman*, 36 Fed. Rep. 154 (1888). As regards the statutory remedy of a creditor in enforcing an unpaid subscription in Maine, see *Libby v. Tobey*, 82 Me. 397 (1890).

In the case of *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859), the court said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporators, or debtors."

²*Russell v. Pacific R'y*, 113 Cal. 258

Still another remedy is often given by statute. The statute may provide that, after the remedy is exhausted against the corporation, the stockholders may by summons be brought into that same suit and compelled to pay.¹

(1896). See also *Christensen v. Eno*, 106 N. Y. 97 (1887).

¹ A state statute may provide that a judgment creditor of a corporation may summon in a stockholder who has not paid his subscription and compel him to pay such subscription to such judgment creditor. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515 (1890). Where the stockholder's liability attaches upon a notice served upon him, the creditor who first serves the notice acquires a prior right to collect. *Wells v. Robb*, 43 Kan. 201 (1890). Although the stockholder's subscription liability may be enforced by levy of execution against his property on a judgment against the corporation, "after sufficient notice," yet notice to a non-resident stockholder by publication is not sufficient. *Wilson v. St. Louis, etc. R'y*, 108 Mo. 588 (1891). Where the statutory mode of collecting subscriptions is by motion based on a judgment against the corporation, notice of the motion being given to the stockholder, such notice is not good when served out of the state on a non-resident. A judgment based on such notice is not good. *Wilson v. Seligman*, 144 U. S. 41 (1892). In Missouri it is held that "a proceeding by motion for execution against a stockholder of an insolvent corporation is in no sense the institution of an independent suit, but a mere supplementary proceeding in aid of the execution against the corporation." *Kohn v. Lucas*, 17 Mo. App. 29 (1885); *Paxon v. Talmage*, 87 Mo. 13 (1885). A proceeding under the Missouri statute after judgment against the corporation to collect stockholders' subscription liability

after a mere notice may be removed into the federal court. *Lackawanna, etc. Co. v. Bates*, 56 Fed. Rep. 737 (1893).

The statutory remedy of issuing execution against stockholders for their unpaid subscriptions on a judgment against the corporation ceases when a receiver is appointed. *Shawalter v. Laredo Imp. Co.*, 83 Tex. 162 (1892). In England this plan has been tried and was unsatisfactory. Creditors, when they could not obtain satisfaction from companies, singled out some unfortunate shareholder, and compelled him to pay the whole amount for which judgment had been recovered. This course was in the highest degree unfair; and parliament was induced, when legislating on joint-stock companies in 1856, to leave out all those clauses, found in the preceding acts, enabling creditors to execute judgments against individual shareholders, and to provide, instead, that creditors should have the power, upon non-payment of the debts due to them from the company, to cause it to be wound up. The same view prevailed when the acts relating to joint-stock companies were remodeled in 1862. Consequently, a creditor of a company registered under the Companies Act, 1862, can only execute a judgment obtained against the company by proceeding against the corporate property, and, if necessary, by having recourse to a petition for winding up the company. In *Lowry v. Inman*, 46 N. Y. 119 (1871), a charter permitting the property of stockholders to be taken upon execution on a judgment against the corporation, and providing that such stock-

§ 202. *The remedy by mandamus.*—It is doubtful whether corporate creditors can, in this country, have recourse to the writ of *mandamus* to compel the officers of the corporation to make a call for the purpose of raising money to meet corporate obligations.¹

In the English courts a *mandamus* is sometimes awarded in these cases.² But in this country the question of calls is not usually of much importance in such cases. The corporation is generally insolvent; a bill is filed in a court of equity to collect and distribute all the assets, and calls on the subscriptions are made by the court itself.³

§ 203. *The remedy by action at law.*—Another remedy is by an action at law. It has been held that unpaid subscriptions, after call, may be enforced by an action at law brought directly by the creditor against the delinquent subscriber, and that in such an action each subscriber is liable, not for his proportionate share, but to the full extent of his unpaid subscription.⁴

holders may use the same powers against others to enforce contribution, was held not to create such a general individual liability as would sustain a personal action.

¹ *Dalton, etc. R. R. v. McDaniel*, 56 Ga. 191 (1876); *Hatch v. Dana*, 101 U. S. 205, 215 (1879). *Cf. Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571, 573 (1842); *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847).

² *Regina v. Victoria Park Co.*, 1 Q. B. 288 (1841); *Regina v. Ledgard*, 1 Q. B. 616 (1841); *Rex v. St. Katherine Dock Co.*, 4 B. & Ad. 360 (1832).

³ See § 108, *supra*.

⁴ *Bank of United States v. Dallam*, 4 Dana (Ky.), 574 (1836); *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847); *Persch v. Simmons*, 3 N. Y. Supp. 783 (1889). An action to recover unpaid subscriptions may be at law. *Faull v. Alaska, etc. Min. Co.*, 8 Sawyer, 420 (1883); *Tama Water-Power Co. v. Hopkins*, 79 Iowa, 653 (1890); *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147 (1895); *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1878); *S. C.*, 29 Fed. Cas. 1189; *White*

v. Blum, 4 Neb. 555 (1876); *McCarthy v. Lavasche*, 89 Ill. 270 (1878); *Freeman v. Winchester*, 18 Miss. 577 (1848). *Contra, Griffith v. Mangam*, 73 N. Y. 611 (1878). *Cf. Glenn v. Lancaster*, 109 N. Y. 641 (1888). Concerning the pleadings in a suit at law to collect subscriptions, see *Glenn v. Sumner*, 132 U. S. 152 (1889). A suit by contractors against subscribers for stock in a company to be organized must be against each separately and not against all in one suit. *Davis v. McMillan*, 13 Ind. App. 424 (1895). The legislature may modify a summary remedy to collect subscriptions. *Ex parte Northeast, etc. R. R.*, 37 Ala. 679 (1861); *Howard v. Kentucky, etc. Ins. Co.*, 13 B. Mon. (Ky.) 282 (1852). See also cases in § 208, *infra*. A statutory remedy of one state is not available in another state. *Christensen v. Eno*, 106 N. Y. 97 (1887).

See also § 223, n., *infra*. A corporate creditor may bring a common-law action to collect a subscription to a foreign corporation. *Savings Assoc. v. O'Brien*, 51 Hun, 45 (1889).

The tendency of the law, however, is to do away with this remedy, and to compel the creditor in all cases to seek his remedy in a court of equity. This tendency is in accord with the best interests of corporate creditors and stockholders and the prevention of a multiplicity of suits, and is to be emphatically commended.¹

§ 204. *The remedy by bill in equity.*—The remedy most usually adopted by corporate creditors to obtain the payment of their claims against the corporation from the unpaid balances of subscriptions due the corporation by the subscribers to the capital stock is by a bill in equity. This is in the nature of a creditor's bill, reaching the equitable assets of the principal debtor. It is the most effectual, simple, and just remedy, and is not only the favorite remedy of the courts, but is generally resorted to by the corporate creditors themselves.² Some of

A subscription paper, "We agree to pay," is several and not joint. A suit against all the subscribers will fail. *Davis, etc. Co. v. Barber*, 51 Fed. Rep. 148 (1892).

¹ See § 204, *infra*.

² *Pfohl v. Simpson*, 74 N. Y. 137 (1878); *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Dayton v. Borst*, 31 N. Y. 435 (1865); *Mann v. Pentz*, 3 N. Y. 415 (1850); *Stephens v. Fox*, 83 N. Y. 313 (1881); S. C., 17 Hun, 435; *Griffith v. Mangam*, 73 N. Y. 611 (1878); *Christensen v. Eno*, 106 N. Y. 97, 100 (1887); *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593 (1844); *Bank of United States v. Dallam*, 4 Dana (Ky.), 574 (1836); *Shickle v. Watts*, 94 Mo. 410 (1888); *Crawford v. Rohrer*, 59 Md. 599 (1882); *Hightower v. Thornton*, 8 Ga. 486 (1850); *Hightower v. Mustian*, 8 Ga. 506 (1850); *Dalton, etc. R. R. v. McDaniel*, 56 Ga. 191 (1876); *German-town Pass. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Adler v. Milwaukee, etc. Co.*, 13 Wis. 57 (1860); *Gianella v. Bigelow*, 71 N. W. Rep. 111 (Wis., 1897); *Curry v. Woodward*, 53 Ala. 371 (1875); *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847); *Wincock v. Turpin*, 96 Ill. 135 (1880); *Hickling v. Wilson*, 104 Ill.

54 (1882); *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1848); *Miers v. Zanesville, etc. Turnp. Co.*, 11 Ohio, 273 (1842); *Judson v. Rossie Galena Co.*, 9 Paige, 598 (1842); *Van Pelt v. U. S. Met. Spring, etc. Co.*, 13 Abb. Pr. (N. S.) 325, 331 (1872). [Compare with this case *Sherwood v. Buffalo, etc. R. R.*, 12 How. Pr. 137 (1855), and *Hammond v. Hudson River, etc. Co.*, 11 How. Pr. 29, 33 (1854).] *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800; *Louisiana Paper Co. v. Waples*, 3 Woods, 34 (1877); S. C., 15 Fed. Cas. 968; *Faul v. Alaska, etc. Min. Co.*, 8 Sawyer, 420 (1883); *Holmes v. Sherwood*, 3 McCrary, 405 (1881); S. C., 16 Fed. Rep. 725; *Chandler v. Siddle*, 10 Nat. Bankr. Reg. 236 (1874); S. C., 5 Fed. Cas. 459; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411 (1874); S. C., 17 Fed. Cas. 1118; *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1878); *Harmon v. Page*, 62 Cal. 448 (1882); *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859); *Sanger v. Upton*, 91 U. S. 56, 60 (1875); *Hatch v. Dana*, 101 U. S. 205 (1879); *Salmon v. Hamborough Co.*, 1 Cas. in Ch. (Eng.) 204 (1671); *Patterson v. Lynde*, 106 U. S. 519 (1882), saying that "no one creditor

the courts have even gone to the extent of holding a bill in equity to be the exclusive remedy for the corporate creditor in these cases.¹ Occasionally, also, statutes are enacted prescribing that a creditor who seeks to apply such assets to the pay-

can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself." A bill in equity may be filed in the federal courts to collect unpaid subscriptions and apply them to the payment of claims of complainants who are corporate creditors. If the sums due the original complainants amount to more than \$2,000, the court has jurisdiction. If the aggregate collections are more than \$5,000 an appeal lies. *Handley v. Stutz*, 137 U. S. 366 (1890). In determining the jurisdiction of the federal court in suits to enforce a stockholder's subscription liability, the aggregate liability of all the stockholders who are joined as defendants is not considered, but the separate liability is considered. *Wilson v. Kiesel*, 164 U. S. 248 (1896). It seems to be well settled that, in the United States courts, unpaid subscriptions can be reached by a corporate creditor in a court of equity only. *Brown v. Fisk*, 23 Fed. Rep. 228 (1885). In Ohio it has been held that an action for unpaid assessments on subscription for stock might be joined in an action on the statutory liability of stockholders. *Warner v. Callender*, 20 Ohio St. 190 (1870). A bill in equity is the proper remedy. *Johnston v. Markle Paper Co.*, 153 Pa. St. 189 (1893); *Baines v. Babcock*, 95 Cal. 581 (1892). A bill may be filed by a judgment creditor whose execution has been returned unsatisfied to enjoin executions, have a receiver appointed, have subscriptions collected, etc. *Bal-lin v. Loeb*, 78 Wis. 404 (1890). In an action to enforce the liability of stockholders in a foreign corporation the plaintiff may examine the defendant

before trial in order to frame his complaint. *Thayer v. Humphreys*, 69 Hun, 343 (1893). A judgment creditor of a corporation with an execution returned unsatisfied may file a bill against a stockholder to reach an unpaid subscription of the latter and to reach corporate property which was illegally conveyed to him. *Hall v. Henderson*, 21 S. Rep. 1020 (Ala., 1897). A corporate creditor, where the corporate property has been exhausted, may file a bill in the nature of a creditor's bill to collect unpaid subscriptions. The suit may be against one subscriber. But the bill must be so framed that other creditors may come in. *Gilchrist v. Helena, etc. R. R.*, 49 Fed. Rep. 519 (1892). The fund realized from the suit in equity is distributed ratably among all the creditors. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

¹ *Thomson, etc. Co. v. Murray*, 37 Atl. Rep. 443 (N. J., 1897); *Jones v. Jarman*, 34 Ark. 323 (1879); *Harris v. First Parish*, 40 Mass. 112 (1839); *Knowlton v. Ackley*, 62 Mass. 93 (1851); *Erickson v. Nesmith*, 81 Mass. 221 (1860); *Smith v. Huckabee*, 53 Ala. 191 (1875); *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Pollard v. Bailey*, 20 Wall. 520 (1874); *Terry v. Little*, 101 U. S. 216 (1879). Cf. *Spear v. Grant*, 16 Mass. 9 (1819); *Hodges v. Silver Hill Min. Co.*, 9 Oreg. 200 (1881). The remedy is in equity alone. *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891); *Burch v. Taylor*, 1 Wash. St. 245 (1890); *Universal F. Ins. Co. v. Tabor*, 16 Colo. 531 (1891). In *Bunn's Appeal*, 105 Pa. St. 49 (1884), the supreme court of Pennsylvania clearly held that upon corporate insolvency no creditor can sue at law

ment of his claim can do so only by a suit in equity.¹ The right to proceed by a suit in equity herein has been held to exist, even where the general equitable remedy by creditor's bill has been abolished by statute.² Where stock has been issued as full paid without any money or property being paid therefor, a judgment creditor's remedy is in equity and not at law. His suit is based, not on a contract, but on the theory that the capital stock is a trust fund for creditors.³

§ 205. *Parties to the bill in equity — Parties plaintiff.*—A corporate creditor who seeks in this way to obtain payment of his claim from the unpaid subscriptions to the capital stock of the corporation should file his bill on behalf of himself and such other creditors as may wish to come in.⁴ The general rule

for the application of unpaid subscriptions to his debt. His remedy is in equity alone. As to discovering the names of stockholders, see *Hipple v. Five Mile, etc. Co.*, 3 Atl. Rep. 682 (N. J. Eq., 1886); also, §§ 519, 520, *infra*.

¹ *Hadley v. Russell*, 40 N. H. 109 (1860).

² *Adler v. Milwaukee, etc. Mfg. Co.*, 13 Wis. 57 (1860). The equitable jurisdiction herein seems to have been based on various grounds. See *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1878). In one case the bill in equity has been held to be in the nature of an equitable attachment in which the subscribers are in effect called on to answer as garnishee of the principal debtor. *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859). In practice a receiver is usually appointed, the amount of the corporate debts and the amount necessary to be contributed by the holders of shares not paid up are ascertained by proof, or through a referee and master's report, and then there is a final decree affording, so far as the assets admit, adequate relief, and, in any event, proportional relief to all parties. *Dalton, etc. R. R. v. McDaniel*, 56 Ga. 191 (1876).

³ *First Nat. Bank v. Peavey*, 69 Fed. Rep. 455 (1895). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. *First Nat. Bank v. Peavey*, 75 Fed. Rep. 154 (1896). The liability of subscribers for stock under the Maine statutes, where the stock is not properly paid up, cannot be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. *Alderson v. Dole*, 74 Fed. Rep. 29 (1896).

⁴ *Handley v. Stutz*, 137 U. S. 366 (1890); *First Nat. Bank v. Peavey*, 75 Fed. Rep. 154 (1896); *Crease v. Babcock*, 51 Mass. 525 (1846); *Holmes v. Sherwood*, 3 McCrary, 405 (1881); *Sawyer v. Hoag*, 17 Wall. 610 (1873); *Mills v. Scott*, 99 U. S. 25 (1878); *Patterson v. Lynde*, 106 U. S. 519 (1882). A creditor's suit to collect unpaid subscriptions must not only be in equity but must be for the benefit of all creditors. *Bickley v. Schlag*, 46 N. J. Eq. 533 (1890); 75 N. W. Rep. 874.

is that such a suit is and should be for the benefit of any or all creditors who elect to come in as parties complainant, and establish their debts according to the course and practice of a court of chancery.¹ While the bill must be so framed as to permit other creditors, if they elect, to come in and be made parties to the suit, it is in no way necessary to join them as parties. The other creditors are proper but not necessary parties.² Several creditors, however, cannot bring separate

¹ *Wetherbee v. Baker*, 35 N. J. Eq. 501 (1882); *Coleman v. White*, 14 Wis. 700 (1862); *Carpenter v. Marine Bank*, 14 Wis. 705, n. (1862); *Morgan v. New York*, etc. R. R., 10 Paige, 290 (1843); *Masters v. Rossie Lead Min. Co.*, 2 Sandf. Ch. 301 (1845); *Mann v. Pentz*, 3 N. Y. 415 (1850); *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Crease v. Babcock*, 51 Mass. 525 (1846); *Pollard v. Bailey*, 20 Wall. 520 (1874); *Terry v. Little*, 101 U. S. 216 (1879). Any creditor has a right to come in, establish his claim, and share *pro rata* in the distribution of the assets, even though the bill was not filed for the benefit of such as should choose to come in and share the expense. *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387 (1884). See also *Tallmadge v. Fishkill Iron Co.*, 4 Barb. 382, 393 (1848); *Walker v. Crain*, 17 Barb. 119, 131 (1853). In consequence thereof no one creditor can, by superior diligence in filing a bill, obtain a preference over other creditors in respect of the unpaid balances of subscriptions. See the cases in preceding note. There is, however, an early case in the Ohio reports which seems to recognize such a preference. *Miers v. Zanesville*, etc. Turnp. Co., 13 Ohio, 197 (1844). See *Adler v. Milwaukee*, etc. Co., 13 Wis. 57 (1860); *Wright v. McCormack*, 17 Ohio St. 86 (1866). There must be an account taken of the amount of debts, assets, and unpaid capital, and a decree for an assessment of the amount due by each stockholder. *Bell's Appeal*, 115 Pa.

St. 88 (1887). Otherwise it is for the jury to say whether the whole of the unpaid subscriptions are needed to pay corporate debts. *Citizens'*, etc. Co. v. Gillespie, 115 Pa. St. 564 (1887). The pleadings may be of such a nature that the trial must be at law. *Glenn v. Lancaster*, 109 N. Y. 641 (1888). A judgment creditor's suit in behalf of himself and other creditors is not in behalf of simple creditors. Where the judgment retains the cause for other judgment creditors who may come in and make a proper showing, this refers only to judgment creditors then existing. Several judgment creditors may join in the suit in equity. A prior judgment in favor of another creditor is not evidence of the liability of the stockholders. *Baines v. West Coast Lumber Co.*, 104 Cal. 1 (1894). As to the form of a decree in a creditor's action, and as to the right of a creditor to discontinue a suit brought in behalf of himself and other creditors, see *Salisbury v. Binghamton Pub. Co.*, 85 Hun, 99 (1895).

² *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800; *Crease v. Babcock*, 51 Mass. 525 (1846); *Hatch v. Dana*, 101 U. S. 205 (1879). Cf. *Adler v. Milwaukee*, etc. Co., 13 Wis. 57 (1860). Corporate creditor suing need not join all the corporate creditors as co-complainants nor all the stockholders liable as defendants. *Cornell's Appeal*, 114 Pa. St. 153 (1886). Other creditors may come in on a bill by a creditor to collect unpaid

suits of this nature. They must all join in one proceeding.¹ A stockholder who is also a creditor may file a bill as a creditor to reach unpaid subscriptions. He must, however, pay his own subscription in full.² The stockholders need not wait to be made parties defendant to a creditors' bill before moving for contribution, but may, in a proper case, before a suit in the nature of a creditors' bill is filed against them by creditors of the corporation, file a bill in equity upon their own account, making the corporation a party, to enforce the payment of unpaid balances of subscription, for the payment of corporate indebtedness, and for contribution.³

§ 206. *Parties defendant*.—The defendants to such a suit should be the corporation itself,⁴ and all from whom an unpaid

subscriptions. *Bailey v. Pittsburgh*, etc. R. R., 139 Pa. St. 213 (1891).

¹ *Crease v. Babcock*, 51 Mass. 525 (1846). But see *Perry v. Turner*, 55 Mo. 418 (1874). And an action to compel the payment of an unpaid subscription may be joined by a creditor with an action to enforce a statutory liability. *Warner v. Callender*, 20 Ohio St. 190 (1870). Accordingly, where a bill is filed, on behalf of all the creditors who choose to come in, against all the stockholders in default, the courts will enjoin a separate creditor's suit. *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253 (1875). Cf. *Coleman v. White*, 14 Wis. 700 (1862); *Carpenter v. Marine Bank*, 14 Wis. 705, n. (1862); *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490 (1864).

² *Bickley v. Schlag*, 46 N. J. Eq. 533 (1890); *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353 (1882), and the valuable note; *Thompson v. Reno Savings Bank*, 19 Nev. 103, 171, 242, 291, 293 (1885). Cf. *Hogg's Appeal*, 88 Pa. St. 195 (1878); *Calhoun v. Steam Ferry Boat*, 27 Int. Rev. Rec. 273 (1881), in which case it is held he cannot sue the corporation. But see *Milvain v. Mather*, 5 Exch. 55 (1850), in which it is held that a corporation sued by a stockholder may set off any amount

due by him on calls. Cf. *Ex parte Winsor*, 3 Story, 411 (1844); S. C., 30 Fed. Cas. 312; *Weber v. Fickey*, 47 Md. 196 (1877), holding that a stockholder who is also a creditor and who has not fully paid his subscription cannot recover from another stockholder the full amount of his claim. *Emmert v. Smith*, 40 Md. 123 (1874), to same effect. A stockholder cannot file a bill to compel others to pay in their subscriptions where he has not paid his own. *Holton v. Wallace*, 66 Fed. Rep. 409 (1895). A stockholder who is also a creditor may enforce the liability, but he must pay his proportion. *Wilson v. Kiesel*, 9 Utah, 397 (1894).

³ *Fiery v. Emmert*, 36 Md. 464 (1872).

⁴ The corporation is ordinarily a necessary party. *Mann v. Pentz*, 3 N. Y. 415 (1850); *Walsh v. Memphis*, etc. R. R., 2 McCrary, 156 (1881); S. C., *sub nom.* *Walser v. Memphis*, etc. R. R., 19 Fed. Rep. 152 (1883); *Wilbur v. Stockholders*, 18 Bankr. Reg. 178 (1878); *Wetherbee v. Baker*, 35 N. J. Eq. 501 (1882); *First Nat. Bank v. Smith*, 6 Fed. Rep. 215 (1879); *Brinckerhoff v. Brown*, 7 Johns. Ch. 217 (1823). But see, *contra*, *Walser v. Seligman*, 21 Blatchf. 130 (1882), a well-considered case, and *Wellman v. Howland Coal, etc. Works*, 19 Fed.

subscription is due, except such as are unknown or insolvent, or beyond the jurisdiction.¹

The stockholders against whom the bill is filed may, however, it seems, when all are not made parties, file a cross-bill,

Rep. 51 (1884). In the former of these cases the court say: "Sufficient reasons for not making it (the corporation) a party are found in the fact that it is beyond the jurisdiction of this court, and also in the fact that it is practically defunct." In the case last cited it was held that, where a corporation is without property or officers or place of business, it need not be made a party of record. The corporation is a necessary party defendant in an action by corporate creditors to collect unpaid subscriptions. Service upon it by publication is insufficient. *King v. Sullivan*, 93 Ga. 621 (1894). 75 N. W. Rep. 874.

¹ *Hadley v. Russell*, 40 N. H. 109 (1860); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253 (1875); *Coleman v. White*, 14 Wis. 700 (1862); *Carpenter v. Marine Bank*, 14 Wis. 705, n. (1862); *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Mann v. Pentz*, 3 N. Y. 415 (1850); *Griffith v. Mangam*, 73 N. Y. 611 (1878); *Vick v. Lane*, 56 Miss. 681 (1879); *Walsh v. Memphis*, etc. R. R., 2 McCrary, 156 (1881). Cf. *Young v. New York*, etc. Steamship Co., 10 Abb. Pr. 229 (1860), holding that judgment creditors are not proper parties defendant without showing why they were not made parties plaintiff. The bill should contain an appropriate allegation as to the shareholders unknown, insolvent, or out of the jurisdiction, and a prayer that, upon discovery, they be made parties when possible. *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147 (1852). It is not necessary to join all the stockholders. *Martin v. South*, etc. Co., 26 S. E. Rep. 591 (Va., 1897). "Where the attempt is to reach the

liability of the shareholders on their subscriptions to capital stock, all the solvent stockholders within the jurisdiction must be joined, except where this will be excused upon an allegation that the number is too great." *Vick v. Lane*, 56 Miss. 681, 684 (1879). But on the other hand, with respect to the matter of joining all the solvent shareholders who are in arrears as parties defendant to the bill, provided they are within the jurisdiction, we find a line of authorities in support of the proposition that all such stockholders are not always necessary parties to the bill; that such a suit may properly be brought against one, or any, of the delinquent stockholders as well as against all; and that a bill will not be held defective merely because it fails to include all the delinquent stockholders as parties defendant. *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1859); *Hatch v. Dana*, 101 U. S. 205 (1879); *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800; *Holmes v. Sherwood*, 3 McCrary, 405 (1881); *Glenn v. Williams*, 60 Md. 93 (1882); *Bartlett v. Drew*, 57 N. Y. 587 (1874); *Brundage v. Monumental*, etc. Min. Co., 12 Oreg. 322 (1885). Cf. *Von Schmidt v. Huntington*, 1 Cal. 55 (1850); *Lamar Ins. Co. v. Gulick*, 102 Ill. 41 (1882). Any other rule would place upon the creditor a burden which would be unjust and perhaps destructive of the remedy itself. In *Hatch v. Dana*, 101 U. S. 205 (1879), there was a bill to compel payment of a debt out of the unpaid subscription of a single stockholder. It was not sought to wind up the company. It being urged that a creditor of an insolvent corporation is not at liberty to proceed against

obtain a discovery of the remaining delinquent stockholders, bring them in as parties, and thus enforce contribution.¹ If all the parties who are liable have not been brought before the

one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution, the court, by Mr. Justice Strong, said: "The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that, if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants." *Cf. Bonewitz v. Van Wert County Bank*, 41 Ohio St. 78 (1884), where it was held error to give judgment against the defendants properly before the court, when the return of

the summons was entirely silent as to two of the defendants. As to when bills brought by creditors in these cases are and are not multifarious, see *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847); *Cambridge Waterworks v. Somerville Dyeing, etc. Co.*, 80 Mass. 193 (1860), where the liability of some of the defendants was as directors and of others as stockholders, and the bill was held to be multifarious; *Barre Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563 (1879); *Pope v. Leonard*, 115 Mass. 286 (1874); *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108 (1874); *Holmes v. Sherwood*, 3 McCrary, 405 (1881). Executors of a deceased stockholder may be joined with other stockholders as defendants where the suit is in equity. *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891). A creditor's bill filed to collect the unpaid subscriptions of stockholders will be dismissed where only a few of the stockholders are made party defendants and no allegation is made showing clearly and in detail that the other stockholders cannot be reached and brought in. *Dunston v. Hoptonic Co.*, 83 Mich. 372 (1890). An insolvent stockholder is not a necessary party to a suit by corporate creditors to collect subscriptions. *Wilson v. California Wine Co.*, 95 Mich. 117 (1893). All the stockholders need not be joined as defendants. *Baines v. Babcock*, 95 Cal. 581 (1892); *Gibbons v. Grinsel*, 79 Wis. 365 (1891). A stockholder may be held liable on a subscription, although the corporation is not made a party defendant and other stockholders are not joined. A court of equity has jurisdiction. *Potter v. Dear*, 95 Cal. 578 (1892).

¹ *Hatch v. Dana*, 101 U. S. 205 (1879). In the original bill itself there may

court, it has been held that those who are defendants of record cannot be charged with liability which should fall upon those who are absent, unless it be shown that the absentees are insolvent or beyond the jurisdiction of the court.¹ There is doubt, however, as to the soundness of this rule.

§ 207. *A court of equity may make a call.*—It is well settled that, when stock is subscribed to be paid in upon call by the corporate authorities, and the company neglects or refuses to make such calls as are necessary to raise funds to meet the just corporate obligations, a court of equity will itself make the necessary calls if the interests of the creditors require it.² The court will, in behalf of the creditors, do what it is the duty of the corporation to do in respect of calls.³ And the court may

properly be a prayer, when some of the delinquent shareholders are unknown, for a discovery, in order that such unknown stockholders may be made parties by amendment. *Hipple v. Five-Mile, etc. Imp. Co.*, 3 Atl. Rep. 682 (N. J., 1886); *Bogardus v. Rosendale Mfg. Co.*, 7 N. Y. 147 (1852); *Morgan v. New York, etc. R. R.*, 10 Paige, 290 (1843).

¹ *Wood v. Dummer*, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435. But see *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800. *Cf. Erickson v. Nesmith*, 46 N. H. 371 (1866). *Contra*, *Cornell's Appeal*, 114 Pa. St. 153 (1886), citing *Stang's Appeal*, 10 W. N. Cas. 409 (1881). When there are delinquent stockholders beyond the jurisdiction, the stockholders who have been sued and compelled to pay more than their due proportion must look to them for contribution. *Holmes v. Sherwood*, 16 Fed. Rep. 725 (1881).

² See § 108, *supra*.

³ *Great Western Tel. Co. v. Purdy*, 162 U. S. 329 (1896); *Scovill v. Thayer*, 105 U. S. 143, 155 (1881); *Hatch v. Dana*, 101 U. S. 205, 214 (1879); *Curry v. Woodward*, 53 Ala. 371 (1875); *Wilbur v. Stockholders*, 18 Nat. Bankr. Reg. 178 (1878); S. C., 29 Fed. Cas. 1189; *Marsh v. Burroughs*, 1 Woods,

463 (1871); S. C., 16 Fed. Cas. 800; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411 (1874); S. C., 17 Fed. Cas. 1118; *Henry v. Vermillion, etc. R. R.*, 17 Ohio, 187 (1848); *Robinson v. Bank of Darien*, 18 Ga. 65 (1855); *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593 (1844); *Sanger v. Upton*, 91 U. S. 56 (1875); *Chubb v. Upton*, 95 U. S. 665 (1877); *Glenn v. Williams*, 60 Md. 93 (1882). *Cf. Germantown Pass. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Chandler v. Keith*, 42 Iowa, 99 (1875); *Mann v. Pentz*, 3 N. Y. 415 (1850); *Ogilvie v. Knox Ins. Co.*, 22 How. 380 (1850); *Adler v. Milwaukee, etc. Co.*, 13 Wis. 57 (1860); *Armstrong v. Danahy*, 75 Hun, 405 (1894). And see *Seymour v. Sturgess*, 26 N. Y. 134 (1862); *Wheeler v. Millar*, 90 N. Y. 353 (1882). The court itself may make a call. *Marson v. Deither*, 49 Minn. 423 (1892). A call is necessary, or the equivalent, where the receiver sues. *Chandler v. Siddle*, 3 Dill. 477 (1874); S. C., 5 Fed. Cas. 459. No call is necessary where creditors file a bill to reach unpaid subscriptions. *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891). Non-resident stockholders are bound by the decree of the court levying the assessment. *Howard v. Glenn*, 85 Ga. 238 (1890). Where the statute requires twenty days' notice

make the call although the statute says calls shall be made by the trustees, directors, or managers.¹ The court may direct the receiver to make a call instead of the court making the call itself directly.² A receiver may collect a call made by the directors.³ A call, whether made by the court or by the directors, is conclusive evidence of the necessity therefor, unless directly attacked and set aside by judicial proceedings.⁴ A stockholder may file a bill in equity to review an assessment obtained by a receiver of an insolvent corporation where the claim upon which the receivership is based and all the proceedings subsequent thereto are permeated with fraud.⁵ No call is necessary if the corporation is insolvent.⁶ The question of whether interest on the call may be collected is considered elsewhere.⁷

§ 208. *Receivers and assignees in bankruptcy for the benefit of creditors — Their duties, powers, and liabilities as to unpaid subscriptions.*—When a corporation becomes insolvent, with corporate creditors on the one hand pressing their claims, and subscriptions to the capital stock wholly or partially uncollected on the other hand, it is usual to place the assets of the company, including the claims against delinquent share-owners, in

to stockholders before calls are made, creditors must give this notice before claiming and collecting the unpaid subscription. *Universal F. Ins. Co. v. Tabor*, 16 Colo. 531 (1891).

¹ *Crawford v. Rohrer*, 59 Md. 599 (1882). *Cf. Glenn v. Saxton*, 68 Cal. 353 (1886). A call may be made in behalf of corporate creditors although the company had contracted with the stockholders not to call in the subscriptions until a later date. *Re Cordova, etc. Co.*, [1891] 2 Ch. 580. Where, however, it was provided by the charter of the corporation that all calls are to be made only upon a three-fourths vote of the stockholders, it was held that a call by the court was irregular. *Louisiana Paper Co. v. Waples*, 3 Woods, 34 (1877); S. C., 15 Fed. Cas. 968.

² *Falk v. Whitman, etc. Co.*, 36 Atl. Rep. 1094 (N. J., 1897).

³ *Wyman v. Williams*, 73 N. W. Rep. 285 (Neb., 1897).

⁴ *Great Western Tel. Co. v. Purdy*, 162 U. S. 329 (1896). Although a court in Virginia, where a company is incorporated, levies, at the instance of a corporate creditor, an assessment upon the stock larger than is necessary to pay the debts, yet the courts of another state will not inquire into the propriety of the amount of the assessment. *Furnald v. Glenn*, 56 Fed. Rep. 372 (1893).

⁵ *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896), reviewing in full the twenty years' litigation growing out of the insolvency of the Great Western Telegraph Company.

⁶ *Ross, etc. Co. v. Southern, etc. Co.*, 72 Fed. Rep. 957 (1896). An assessment by a board of directors or a decree in chancery is not necessary to sustain an attachment by a receiver to collect the unpaid subscriptions of non-residents. *Kohler v. Agassiz*, 99 Cal. 9 (1893).

⁷ See § 112, *supra*.

the hands of a third person for the benefit of all concerned. Such a person may be an assignee under state insolvent laws, a receiver, or an assignee for the benefit of creditors. A receiver in such a case may be defined to be a third person appointed by a court of equity to act as the representative alike of creditors and stockholders for the purpose of collecting the corporate assets and paying the corporate debts.¹ It is the right and duty of such a receiver to collect the unpaid subscriptions, so far as may be necessary, for the purpose of paying the corporate debts in full.²

¹ *Johnson v. Laffin*, 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; aff'd, 103 U. S. 800 (1880).

² *Dayton v. Borst*, 81 N. Y. 435 (1865); *Nathan v. Whitlock*, 9 Paige, 152 (1841); *Means's Appeal*, 85 Pa. St. 75 (1877); *Dorris v. French*, 4 Hun, 292 (1875); *Van Wagenen v. Clark*, 22 Hun, 497 (1880); *Frank v. Morrison*, 58 Md. 423 (1882); *Chandler v. Brown*, 77 Ill. 333 (1875); *Calkins v. Atkinson*, 2 Lans. 12 (1870). Cf. *Tucker v. Gilman*, 45 Hun, 193 (1887); *Tobey v. Russell*, 9 R. I. 58 (1868); *Stewart v. Lay*, 45 Iowa, 604 (1877); *Clarke v. Thomas*, 34 Ohio St. 46 (1877); *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876). See also § 870, *infra*. A receiver may sue to collect calls which became due before his appointment. *Basting v. Ankeny*, 64 Minn. 133 (1896). A receiver of the corporation may levy an attachment to collect the unpaid subscriptions of non-residents. *Kohler v. Agassiz*, 99 Cal. 9 (1893). An assignee for benefit of creditors of an insolvent corporation may enforce unpaid subscriptions. *Chamberlain v. Bromberg*, 83 Ala. 576 (1888). As incidental to the receiver's power to collect unpaid balances of subscription, it is held that he may, as an officer of the court, make calls for the amount due. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484 (1847); *Rankine v. Elliott*, 16 N. Y. 377 (1857). *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 499 (1881), holds that an

assignee for benefit of creditors may, by a bill in equity, compel the directors of the insolvent corporation to make an assessment upon the capital stock, payable to him; such a suit is not affected by the fact that certain creditors are proceeding against the stockholders by motion under the statute, since the proceeding by motion is cumulative merely and not exclusive. *Chandler v. Keith*, 42 Iowa, 99 (1875), holds that a stockholder who had paid all regular assessments could not be called upon by the receiver, in an action at law, to pay the remainder of his subscription until a general call is made upon the stockholders for the amount assessed upon their shares, and this call should be preceded by the fact that losses have been sustained by the corporation, showing a necessity for an assessment and call upon the stockholders. A receiver represents the corporation, its stockholders and creditors. *Hubbell v. Syracuse, etc. Works*, 42 Hun, 182 (1886). "The receiver represents the creditors as well as all other parties interested in the corporation." A subscriber sued by him on the subscription cannot set up fraudulent representations inducing him to subscribe. *Ruggles v. Brock*, 6 Hun, 164 (1875). A receiver may cause to be assessed and may collect assessments on parties liable therefor to pay insurance losses. *McDonald v. Ross-Lewin*, 29 Hun, 87

As long as the authority of the receiver exists, a creditor cannot directly bring suit against delinquent shareholders, but the receiver may be compelled to act in the matter at the instance of creditors.¹ Before the court authorizes a receiver to collect

(1883). An order that the receiver may collect the unpaid subscriptions is not a "call," but merely gives authority. *Liggett v. Glenn*, 51 Fed. Rep. 381 (1892). The statute of limitations runs only from the time when the court makes a call. An action at common law on subscriptions must be in the company's name, and not in the name of the assignee of the company. *Glenn v. Marbury*, 145 U.S. 499 (1892). Under the English Railway Companies Act of 1867, § 4, a receiver has no such power. *Re Birmingham, etc. R'y*, L. R. 18 Ch. D. 155 (1881). In New York, by statute, the receiver may sue. See *Dayton v. Borst*, 31 N. Y. 435 (1865); and see, previous to the statute, *Mann v. Pentz*, 3 N. Y. 415 (1850), reversing 2 Sandf. Ch. 257. The receiver cannot enforce the subscription where the defendant had transferred his stock and been discharged by the corporation. *Cutting v. Damerel*, 88 N. Y. 410 (1882). It may be remarked here that the receiver has no power to enforce statutory liability, this liability not being an asset of the corporation. See *Farnsworth v. Wood*, 91 N. Y. 308 (1883), and ch. XII, *infra*.

The receiver of a foreign corporation, duly empowered to sue at home, may sue resident stockholders for the balances due the company, provided the corporation itself could have done so if it had remained solvent. *Dayton v. Borst*, 31 N. Y. 435 (1865), a case where a receiver appointed by the court of chancery in New Jersey was held competent to maintain a suit of this nature in New York against a citizen thereof; *Mann v. Cooke*, 20 Conn. 178 (1850). See also *McDonough v. Phelps*, 15

How. Pr. 372 (1856); *Seymour v. Sturges*, 26 N. Y. 134 (1862). It has been held that a receiver may collect unpaid balances due on subscriptions, although the other corporate assets have not been collected and the amount of the liabilities is undetermined. *Stark v. Burke*, 9 La. Ann. 341 (1854). And that if, on the final settlement, there is a surplus, it is to be returned *pro rata* to the shareholders who have paid in full. *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 122 (1845). But the more modern and better rule is that a receiver has no authority to call upon a subscriber for his unpaid balance until the court have determined the amount of the corporate indebtedness and fixed definitely the liability of each share of the stock. *Chandler v. Keith*, 42 Iowa, 99 (1875). See also *Mills v. Scott*, 99 U. S. 25 (1878). After a transfer, the transferrer is not liable to the receiver any more than he would have been to the corporation. *Billings v. Robinson*, 94 N. Y. 445 (1884), affirming 28 Hun, 122 (1882). See ch. XV, *infra*. As to the power of the court to give a receiver power to compromise claims upon unpaid subscriptions, see *Chandler v. Brown*, 77 Ill. 333 (1875). See §§ 167-171, *supra*, and § 210, *infra*. A receiver cannot enforce subscriptions which the corporation could not enforce. *Winters v. Armstrong*, 37 Fed. Rep. 508 (1889). The receiver may sell the subscription at auction and the subscriber may buy it. *Dean v. Biggs*, 25 Hun, 122 (1881). 40 Alt. Rep. 275.

¹After a receiver has been appointed, a creditor cannot institute proceedings to collect unpaid subscriptions. *Rouse, etc. Co. v. Detroit*,

unpaid subscriptions there must be a judicial ascertainment of the corporate debts.¹ No judgment is necessary against the corporation in a suit by a receiver against directors for calls

etc. Co., 69 N. W. Rep. 511 (Mich., 1896). After a receiver has been appointed, he alone can collect the unpaid subscriptions. *Big Creek Stone Co. v. Seward*, 144 Ind. 205 (1895). Where a receiver has been appointed, he alone can bring an action to compel stockholders to refund corporate moneys which they have taken after paying in the same on their subscriptions. *South Bend, etc. Co. v. Pierre F. & M. Ins. Co.*, 4 So. Dak. 173 (1893). It is the receiver's duty to act promptly and vigilantly in the collection of the assets, and to compel payment of balances due by subscribers on unpaid stock, if such a course is necessary to meet the demands of creditors. If the receiver fails to do his duty in this respect the creditors may compel him to act, inasmuch as they cannot act directly themselves. *Gas Light, etc. Co. v. Haynes*, 7 La. Ann. 114 (1852); *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 457 (1851); *Stark v. Burke*, 9 La. Ann. 341 (1854); *Atwood v. Rhode Island Agric. Bank*, 1 R. I. 376 (1850); *Rankine v. Elliott*, 16 N. Y. 377 (1857), holding that when a receiver of an insolvent railroad is appointed in an action in behalf of all its creditors, the right to proceed for the collection of unpaid subscriptions vests in him, and a judgment creditor will be enjoined from proceeding against a stockholder in an action begun after the

order was made, but before the appointment is perfected. While the receiver is in charge, a corporate creditor cannot sue to enforce a stockholder's liability on an unpaid subscription. *Merchants' Nat. Bank v. Northwestern Mfg. Co.*, 48 Minn. 361 (1892).

In Indiana a creditor of a manufacturing corporation can collect his debt from unpaid subscriptions through a receiver, and in that way only. *Wheeler v. Thayer*, 121 Ind. 64 (1889). The United States district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. *Stephens v. Bernays*, 44 Fed. Rep. 642 (1890). A receiver may cause to be assessed and may collect assessments on parties liable therefor to pay insurance losses. *McDonald v. Ross-Lewin*, 29 Hun, 87 (1883). Where a receiver is appointed to take charge of "the property" he may sue to collect unpaid subscriptions. *Showalter v. Laredo Imp. Co.*, 83 Tex. 162 (1892). In a judgment creditor's suit for sequestration and a receiver, both the corporation and a stockholder liable on his subscription being made parties, the receiver may have judgment against the stockholder. *Spooner v. Bay St. Louis Synd.*, 47 Minn. 464 (1891). Although some fraudulent claims have been allowed in the court which appointed the receiver and

¹*State v. German, etc. Bank*, 70 N. W. Rep. 221 (Neb., 1897). A receiver cannot bring suit to collect subscriptions until the corporate debts have been ascertained and the corporate property exhausted, but unpaid calls made by the directors may be collected by the receiver as a part of the corporate assets. *Wyman*

v. Williams, 74 N. W. Rep. 48 (Neb., 1898). In a receiver's suit at law to collect subscriptions, his allegation that all the subscriptions were necessary to pay the debts will raise a presumption that the court ascertained such to be the fact before the suit was commenced. *Worth v. Wharton*, 29 S. E. Rep. 370 (N. C., 1898).

which had been made by the directors.¹ Where a receiver fails to allege that his suit to collect subscriptions was authorized by the court, his action will fail.² Where the receiver refuses to collect the subscriptions, the remedy of the creditor is to apply for the removal of the receiver,³ or a creditor may intervene and proceed himself.⁴ But a creditor cannot sue to reach subscriptions for stock, unless the receiver refuses to sue.⁵ The receiver's suit to collect unpaid subscriptions may be at law⁶ or in equity.⁷

made the calls, yet a stockholder who is sued in another state cannot enjoin the collection of the judgment on that ground. *Foote v. Glenn*, 52 Fed. Rep. 529 (1892). Although the statute of limitations is a bar unless the court allows creditors to be substituted in place of a receiver who has brought suits to enforce the liability of stockholders and is held not to have had authority to do so, yet such substitution will not be granted. *Fairbanks v. Farwell*, 141 Ill. 354 (1892). The position of the receiver as regards the collection of subscriptions is stated in *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 167, 172 (1890). The court referred to and considered many authorities. "The receiver represents the creditors as well as all other parties interested in the corporation." A subscriber sued by him on the subscription cannot set up fraudulent representations inducing him to subscribe. *Ruggles v. Brock*, 6 Hun, 164 (1875). Where the bonds are invalid a receiver appointed in the foreclosure suit has no power to collect subscriptions. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 49 Fed. Rep. 188 (1892). A receiver may collect the unpaid par value of stock issued for cash at less than par, even though the corporation agreed with the stockholders that no more than the amount already paid should ever be required. Such an agreement does not bind the receiver in so far as it is necessary for him to collect the

money to pay creditors. *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892).

¹ *Wyman v. Williams*, 73 N. W. Rep. 285 (Neb., 1897).

² *Gainey v. Gilson*, 48 N. E. Rep. 633 (Ind., 1897).

³ *Links v. Connecticut, etc. Co.*, 66 Conn. 277 (1895).

⁴ *Spilman v. Mendenhall*, 57 N. W. Rep. 468 (Minn., 1894).

⁵ *First Nat. Bank v. Dovetail, etc. Co.*, 143 Ind. 534 (1896).

⁶ Where a court of equity makes a call and directs the receiver to collect, his remedy is at law and not in equity. *Barkalow v. Totten*, 53 N. J. Eq. 573 (1895). The receiver may sue each stockholder separately at law. His appointment cannot be questioned. *Elderkin v. Peterson*, 8 Wash. 674 (1894). A suit by the receiver to collect is at law and not in equity. *Smith v. Johnson*, 49 N. E. Rep. 693 (Ohio, 1898).

⁷ A receiver of an insolvent corporation appointed by a federal court may file a bill in the United States court to collect unpaid subscriptions. *Bausman v. Denny*, 73 Fed. Rep. 69 (1896). See 79 id. 172. The receiver may file a petition in connection with the main suit, and by this petition bring in the stockholders and compel them to pay their subscriptions. *Peck v. Elliott*, 79 Fed. Rep. 10 (1897). The enforcement of the liability of a subscriber to the stock of a corporation by an auxiliary suit in equity, brought by the receiver of the corporation ap-

There has been considerable controversy as to whether a stockholder who is sued by a receiver on a subscription may set up defenses which were good as against the corporation, but which are no longer good as against corporate creditors. The question is theoretically difficult because the receiver represents the corporation as well as corporate creditors. Practically, however, a receivership means insolvency and the final elimination of the corporation, and the just rule seems to be that defenses which are not good as against corporate creditors are not good as against a receiver of an insolvent corporation.¹

An assignee for the benefit of the creditors of a corporation, like a receiver, represents both the corporation and the creditors, and should collect unpaid subscriptions;² and, in like manner, an assignee in bankruptcy could recover the amounts due by stockholders on account of their subscriptions, and his proper remedy is by a bill in equity, making all the delinquent shareholders parties to the bill.³

pointed in a creditors' suit instituted upon its insolvency, does not infringe the constitutional right of such subscriber to a trial by jury. *Ross-Meehan, etc. Co. v. Southern, etc. Co.*, 72 Fed. Rep. 957 (1896).

¹ *Cole v. Satsop, etc. R. R.*, 9 Wash. 487 (1894). *Cf. Republic L. Ins. Co. v. Swigert*, 135 Ill. 150 (1890); *Winters v. Armstrong*, 37 Fed. Rep. 508, 521 (1889).

² *Shockley v. Fisher*, 75 Mo. 498 (1882); *Vanderwerken v. Glenn*, 85 Va. 9 (1888); *Beal v. Dillon*, 47 Pac. Rep. 317 (Kan., 1896). *Cf. German-town Pass. R'y v. Fitler*, 60 Pa. St. 124 (1869); *Eppright v. Nickerson*, 78 Mo. 482 (1883), holding that an insolvent corporation may include in an assignment for the benefit of its creditors the liability of its stockholders for unpaid stock for which no call has been made. An action at common law on subscriptions must be in the company's name and not in the name of the assignee of the company. *Glenn v. Marbury*, 145 U. S. 499 (1892). An assignee of the corporation for the

benefit of creditors may sue. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid and no bar to a creditor's action to collect unpaid subscriptions. *Doernbecher v. Columbia, etc. Co.*, 21 Oreg. 573 (1892). It has been held that the assignee cannot sue to set aside a fraudulent device by which a stockholder has escaped payment of his subscription. *Bouton v. Dement*, 123 Ill. 142 (1887). Where the corporation has been dissolved, and its assets distributed, and its trustees discharged by a decree of court, a creditor who was a party to the suit cannot afterward maintain a bill against the trustees to reach unpaid subscriptions. *Chavent v. Schefer*, 59 Fed. Rep. 231 (1894).

³ *Sawyer v. Hoag*, 17 Wall. 610, 621 (1873); *Upton v. Tribilcock*, 91 U. S. 45 (1875); *Sanger v. Upton*, 91 U. S. 56 (1875); *Webster v. Upton*, 91 U. S. 65 (1875); *Chubb v. Upton*, 95 U. S. 665

§ 209. *The judgment against the corporation impeachable only for fraud or want of jurisdiction.*—That a judgment conclusively settles all matters of controversy involved in the suit, so far as parties or their privies are concerned, excepting where it may be impeached for fraud or want of jurisdiction, is well-established law. When, therefore, a corporate creditor has obtained judgment against the corporation, and execution is returned unsatisfied, and he then proceeds to enforce his remedy against the holders of stock not paid up, the question arises whether the stockholders may set up in defense matters which the corporation might have set up or did set up to defeat the creditor's claim against the corporation.

It has been strenuously insisted that they might. This was Chancellor Kent's contention in the case of *Slee v. Bloom*;¹ but the authorities have firmly established the rule that, in the absence of fraud and collusion, judgments against the corporation, if the court had jurisdiction, are conclusive against the stockholders as to the validity and amount of the creditor's claim.² Thus, it is held that the stockholder cannot take ad-

(1877); *Payson v. Stoeve*, 2 Dill. 427 (1873); S. C., 19 Fed. Cas. 27; *Upton v. Hansbrough*, 3 Biss. 417 (1873); S. C., 28 Fed. Cas. 839. Cf. *Morgan County v. Allen*, 103 U. S. 498 (1880). The principles of equity applicable to actions by a receiver in cases of this nature will, in general, unless some statute has changed the law, be found applicable to these actions when brought by assignees at common law or in bankruptcy.

¹ 5 Johns. Ch. 366 (1820); reversed by 19 Johns. 456, 473 (1822), by Spencer, C. J.

² *Slee v. Bloom*, 20 Johns. 669 (1822); *Hawkins v. Glenn*, 131 U. S. 319 (1889); *Henry v. Vermillion*, etc. R. R., 17 Ohio, 187 (1848); *Hampson v. Weare*, 4 Iowa, 13 (1856); *Milliken v. Whitehouse*, 49 Me. 527 (1860); *Wilson v. Pittsburgh*, etc. Coal Co., 43 Pa. St. 424 (1862); *Bank of Wooster v. Stevens*, 1 Ohio St. 233 (1853); *Stevens v. Fox*, 83 N. Y. 313 (1881); *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C.,

16 Fed. Cas. 800; *Grund v. Tucker*, 5 Kan. 70 (1869); *Bissit v. Kentucky*, etc. Nav. Co., 15 Fed. Rep. 353, and note, p. 360 (1882); *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385 (1869); *Nichols v. Stevens*, 123 Mo. 96 (1894). "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding." *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895). So, also, in actions to enforce statutory liability of stockholders, a judgment against the corporation is equally conclusive. *Donworth v. Coolbaugh*, 5 Iowa, 300 (1857); *Came v. Brigham*, 39 Me. 35 (1854); *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385 (1869), holding that a judgment by default is *prima facie* conclusive; *Stevens v. Fox*, 83 N. Y. 313 (1881); *Holyoke Bank v. Goodman Paper Mfg. Co.*, 63 Mass. 576 (1852), holding that a judgment by default is con-

vantage, in the suit against him, of a defect in the service of process upon the corporation in the original suit. His remedy in such a case is by a direct proceeding.¹ A stockholder sued on his liability cannot file a bill to enjoin the suit on the ground that the decree establishing the indebtedness of the corporation was fraudulent.² Nor can the judgment be attacked on the ground that the judgment was obtained in the federal court by one to whom the claim was transferred in order to give jurisdiction.³ In New York the conclusiveness of the judgment in these cases has been much questioned.⁴

clusive; Bigelow, *Estop.*, 129, 4th ed.; Freeman, *Judgm.*, § 177, 3d ed. The stockholder may, of course, set up that he is not a stockholder, and other similar defenses, such as are specified in ch. X, *supra*. See §§ 210, 224, *infra*. See also *Merrill v. Suffolk Bank*, 31 Me. 57 (1849); *Johnson v. Somerville, etc. Co.*, 81 Mass. 216 (1860); *Glenn v. Springs*, 26 Fed. Rep. 494 (1885); *Powell v. Oregonian R'y*, 38 Fed. Rep. 187 (1889); *Barron v. Paine*, 83 Me. 312 (1891). The decree of the court where the corporation is located is conclusive as to whether service was properly made on the corporation, such service being on two directors and the cashier. The decree is also conclusive that no laches existed in bringing suit; that the statute of limitations was no bar to the decree; that the court had authority to make the assessment; that the change in the corporate name did not discharge the stockholders' liability; and that the trustee, Glenn, might sue the stockholders. *Lehman v. Glenn*, 87 Ala. 618 (1889). The judgment against the corporation is conclusive, and it cannot be shown that it arose on a contract which was *ultra vires*. *Sumner v. Marcy*, 3 Woodb. & M. 105 (1847); *S. C.*, 23 Fed. Cas. 384; *Baines v. Babcock*, 95 Cal. 581 (1892). Stockholders cannot attack the debts upon which the judgment was obtained. *Hambleton v. Glenn*, 72 Md. 351 (1890). And it is

no defense that the judgment against the corporation was obtained by collusion with one of the directors. *Hambleton v. Glenn*, 72 Md. 351 (1890). The suit may be on the judgment against the corporation, and not on the original claim. *Henderson v. Turngren*, 9 Utah, 432 (1894). The judgment is not conclusive where it was for an excessive amount and was entered by consent of the president, who had an interest in the judgment. *Wilson v. Kiesel*, 9 Utah, 397 (1894). *Cf.* 40 Alt. Rep. 275.

¹ *Came v. Brigham*, 39 Me. 35 (1854). The stockholder sued on his subscription may set up that the judgment against the corporation was obtained by service on one who had ceased to be an officer. *Beardsley v. Johnson*, 121 N. Y. 224 (1890). *Cf.* *Wheeler v. Miller*, 24 Hun, 541 (1881). In *Chestnut v. Pennell*, 92 Ill. 55 (1879), it was held that a decree against the corporation is not admissible in evidence against a stockholder who was not a party to the bill or decree, actually or constructively, and that in such a case proof of the liability of the corporation to the creditor should be given.

² *Furnald v. Glenn*, 64 Fed. Rep. 49 (1894).

³ *Tuthill Spring Co. v. Smith*, 90 Iowa, 331 (1894).

⁴ New York is practically the only state where this question presents any difficulty, and the confusion

Where the stockholders are liable only on a particular class of corporate debts, or to certain classes of creditors only, the court will not, of course, reject evidence tending to show either that the debt recovered belongs or does not belong to the class on which the shareholder is liable.¹

§ 210. *Defenses available against corporate creditors in actions to compel payment of balances of subscriptions.*—There are, of course, certain defenses which subscribers may set up

which there reigns is largely due to the failure to distinguish between cases of liability for unpaid subscriptions and liabilities created by statute. In some of the cases the meaning of the court is not clear, and often the question did not come up directly for decision. The general rule was originally stated essentially as in the text, by Spencer, C. J., in *Slee v. Bloom*, 20 Johns. 669 (1822), reversing S. C., 5 Johns. Ch. 366 (1821). This was followed by *Moss v. Oakley*, 2 Hill, 265 (1842). *Moss v. McCullough*, 5 Hill, 131 (1843), started a new theory, that the case was the ordinary one of principal and surety, and hence a judgment against the corporation was not even *prima facie* evidence against the stockholder. Although this ruling was overturned on the final determination (S. C., 7 Barb. 279—1849), it was followed in *Strong v. Wheaton*, 38 Barb. 616 (1861). In *Belmont v. Coleman*, 21 N. Y. 96 (1860), on appeal from 1 Bosw. 188, three justices affirmed the ruling below that the judgment was *prima facie* evidence, while the other four refused to commit themselves to that doctrine. *Conklin v. Furman*, 8 Abb. Pr. (N. S.) 161 (1865), accepts the original rule as stated by Spencer, C. J. Then follow two later cases, *Miller v. White*, 50 N. Y. 137 (1872), and *McMahon v. Macy*, 51 N. Y. 155 (1872), which reject that rule in strong terms. But both these cases are easily distinguishable on the principle stated *supra*. They were

suits to enforce a statutory penalty against trustees for failure to file a certain report. It may be said, then, that, after all, the New York rule, in the cases really covered by the language of the text, differs comparatively little from the general law. The courts, under the influence of some of the earlier decisions, hesitate to accept the rule of conclusiveness; but the court of appeals has used this language: "The creditor thus claims through the corporation, and to entitle him to this statutory subrogation or transfer he need only show that he is a creditor. If he shows this fact by evidence which is binding and conclusive against the corporation, such evidence should be competent against the stockholder to establish the title of the creditor to succeed to the rights of the corporation. A judgment against the corporation, being the highest evidence against it, should be as effectual to pass its title to the fund in question as a deed or any other form of transfer." *Stephens v. Fox*, 83 N. Y. 313, 317 (1881). Cf. *Wheeler v. Miller*, 24 Hun, 541 (1881); also § 224, *infra*. See also *Grund v. Tucker*, 5 Kan. 70 (1869); *Merchants' Bank v. Chandler*, 19 Wis. 434 (1865).

¹ *Wilson v. Pittsburgh, etc. Coal Co.*, 43 Pa. St. 424 (1862); *Conant v. Van Schaick*, 24 Barb. 87 (1857); *Larabee v. Baldwin*, 35 Cal. 155 (1868). Cf. *Hudson v. Carman*, 41 Me. 84 (1856), holding that the judgment obtained may not be conclusive evi-

when actions are brought against them on behalf of corporate creditors. These defenses are the same as those which may be set up to defeat an action by the corporation to enforce the subscription.¹ But both in England and in this country the courts do not favor such defenses, especially after the corporation has become insolvent. Moreover, there are many defenses which might defeat an action by the corporation, but which do not prevent the corporate creditor from enforcing the subscription.² A creditor may, by express contract, waive his right to compel stockholders to pay their unpaid subscriptions.³

dence of the organization and existence of the corporation, and if denied they must be proved.

¹ See ch. X. Thus, stockholders cannot defeat their liability on stock by setting up that they subscribed in behalf of the corporation itself, and on the secret agreement that they should not be held liable. *Barto v. Nix*, 15 Wash. 563 (1896). A subscription to be paid for when the directors find other parties who will agree to purchase the stock from the subscriber is illegal as an attempt to release a subscriber. *McNulta v. Corn Belt Bank*, 164 Ill. 427 (1897). A stockholder who settles with a corporation for a less sum than the amount due, just before garnishee process is commenced against him, cannot defeat the process in this manner. *World's Fair, etc. Co. v. Gasch*, 162 Ill. 402 (1896). The stockholders' liability may be enforced by a corporate creditor, even though the corporation has given collateral security to such creditor. *Dawson v. Sholley*, 4 Kan. App. 367 (1896). A tender of the stock is not necessary where the corporation alleges that it is ready and willing to issue the stock. *Seymour v. Jefferson*, 74 N. W. Rep. 149 (Minn., 1898). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. *Wyman v. Williams*, 74 N. W. Rep.

48 (Neb., 1898). To enforce the liability on watered stock there may be set off the amount coming to the stockholder on bonds of the company, especially where the stockholder is insolvent. *Hebberd v. Southwestern, etc. Co.*, 36 Atl. Rep. 122 (N. J., 1896). A subscriber who is sued by a receiver of the corporation on a subscription cannot set up the defense that the purpose of the corporation was illegal, in that it involved a drawing for distribution among the stockholders of lots of unequal value. *Cardwell v. Kelly*, 28 S. E. Rep. 953 (Va., 1898). Where a company has assigned unpaid subscriptions, the company itself may not be able to collect them. *Clark v. Sigua, etc. Co.*, 81 Fed. Rep. 310 (1897).

² Such as fraud on the part of the corporation, inducing a subscription. See §§ 163, 164, *supra*. So also fraud and mismanagement on the part of the directors and corporate officers is not a valid defense herein. *Re Republic Ins. Co.*, 3 Biss. 452 (1873); S. C., 20 Fed. Cas. 544. The stockholder may set up that the corporation had no stock to offer him. *Lathrop v. Kneeland*, 46 Barb. 432 (1866). *Cf. Mackley's Case*, L. R. 1 Ch. D. 247 (1875). But mere entries in corporate books are not admissible in evidence to prove the creditor's claim. *Neilson v. Crawford*, 52 Cal. 248 (1877). Where a firm or partnership be-

³ *Bush v. Robinson*, 95 Ky. 492 (1894). See also § 216, *infra*.

§ 211. *Contribution*.—Corporate creditors compelling stockholders to pay their subscriptions are under no obligation to see that the payments made by the subscribers are proportionally equal.¹ A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other shareholders.² The rule, moreover, is well settled that a shareholder who has been compelled to pay more than his proportion of the debts of the company may maintain an action against his co-stockholders for contribution.³

comes a subscriber in the copartner-ship name, corporate creditors may have execution against any one of the partners. The partnership subscription is not a defense of which any single partner can avail himself to escape liability. *Bray v. Seligman*, 75 Mo. 31 (1881). It is no defense that judgment against the defendant stockholder for the full amount of his liability has been recovered by other creditors, and that he settled the same at a discount. *Kunkelman v. Rentchler*, 15 Ill. App. 271 (1884). Prominent among these defenses is the defense that the corporation contracted with the defendant that his stock should be deemed fully paid-up stock, although in fact the full par value had never been paid. See ch. III.

The unpaid subscription may be collected in payment of damages for a tort the same as for a contract debt. *Powell v. Oregonian R'y*, 36 Fed. Rep. 726 (1888); S. C., 38 Fed. Rep. 187. In Maine this rule is declared by statute. *Grindle v. Stone*, 78 Me. 176 (1886). For many other defenses, see ch. XII, where defenses were set up to defeat the statutory liability.

¹ *Pentz v. Hawley*, 1 Barb. Ch. 123 (1845). Cf. 75 N. W. Rep. 874.

² *Pentz v. Hawley*, 1 Barb. Ch. 123 (1845); *Evans v. Coventry*, 25 L. J. Ch. 489 (1856); *Marsh v. Burroughs*, 1 Woods, 463 (1871); S. C., 16 Fed. Cas. 800. As to whether solvent

stockholders are required to make up, for the benefit of creditors, the deficiency of defaulting or insolvent subscribers to the full amount of the former's own unpaid subscriptions, see *South Carolina Mfg. Co. v. Bank of South Carolina*, 6 Rich. Eq. (S. C.) 227 (1854). But actual subscribers are not liable for that part of the capital stock which was never subscribed. *Evans v. Coventry*, 25 L. J. Ch. 489 (1856), and § 243, *infra*. It is no defense to show that notes were given in payment of subscriptions, or that notes by insolvent persons were procured to be given, when it appears that nothing was ever realized from the notes. *Nathan v. Whitlock*, 9 Paige, Ch. 152 (1841). When it is made to appear by proof that some of the stockholders are insolvent, the solvent must pay the proportion of the insolvent, to be apportioned among them according to and up to the amount of their stock subscribed and unpaid. *Hodges v. Silver Hill Min. Co.*, 9 Oreg. 200 (1881). All of the stockholders who are defendants will have judgment entered against them for their full liability, and they must seek contribution themselves. *Hamilton v. Clarion, etc. R. R.*, 144 Pa. St. 34 (1891).

³ *Wincock v. Turpin*, 96 Ill. 135 (1880); *Millaudon v. New Orleans, etc. R. R.*, 3 Rob. (La.) 488 (1843); *Thomson's Succession*, 46 La. Ann. 1074 (1894); *Marsh v. Burroughs*, 1 Woods,

A stockholder who is compelled to pay a tax levied by the government on liquor distilled by the corporation may have contribution from the other stockholders.¹

Contribution may properly be enforced in the corporate creditor's suit. It is largely for this purpose that all the delinquent shareholders may be and should be made parties defendant.²

463 (1871); S. C., 16 Fed. Cas. 800; *Holmes v. Sherwood*, 3 McCrary, 405 (1881); *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Matthews v. Albert*, 24 Md. 527 (1866); *Stewart v. Lay*, 45 Iowa, 604 (1877); *Hadley v. Russell*, 40 N. H. 109 (1860); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Masters v. Rossie Lead Min. Co.*, 2 Sandf. Ch. 301 (1845); *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381 (1870); *Stover v. Flack*, 30 N. Y. 64 (1864); *Farrow v. Bivings*, 12 Rich. Eq. (S. C.) 25 (1866); *Allen v. Fairbanks*, 45 Fed. Rep. 445 (1891). *Cf.* *Andrews v. Callender*, 30 Mass. 484 (1833); *Gray v. Coffin*, 63 Mass. 192 (1852); *Sutton's Case*, 3 De G. & Sm. 262 (1850). In Pennsylvania the right to contribution is said to be purely statutory. *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43 (1864). A liability for contribution on subscriptions does not cease upon the death of the stockholders. *Allen v. Fairbanks*, 40 Fed. Rep. 188 (1889). The remedy of one stockholder against another for contribution is in equity and not at law.

Koons v. Martin, 66 Hun, 554 (1893). A stockholder may have contribution. *Van Pelt v. Gardner*, 74 N. W. Rep. 1083 (Neb., 1898).

¹ *Wolters v. Henningsan*, 114 Cal. 433 (1896).

² N. Y. Code Civ. Proc., §§ 1791-1794; *Masters v. Rossie Lead Min. Co.*, 2 Sandf. Ch. 301 (1845); *Holmes v. Sherwood*, 3 McCrary, 405 (1881); *Hadley v. Russell*, 40 N. H. 109 (1860); *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Hodges v. Silver Hill Min. Co.*, 9 Oreg. 200 (1881). Where the articles of incorporation provide that the indebtedness shall not exceed a certain sum, but debts are contracted in excess of the limit, and, the corporation being insolvent, the officer who contracted the debt pays it off out of his own individual funds, he cannot claim contribution unless the debt, in excess of the limit was contracted by the unanimous assent of the stockholders. *Haldeman v. Ainslie*, 82 Ky. 395 (1884).

CHAPTER XII.

STATUTORY LIABILITY OF STOCKHOLDERS TO CORPORATE CREDITORS.

A. EXTENT OF THE LIABILITY.

§§ 212, 213. Statutory liability in general.

214. The liability is strictly construed and limited.

215. Particular statutes construed as to the extent of the liability.

216. Waiver by corporate creditors of their statutory rights against stockholders.

217. Statutory liability not enforceable to pay damages recovered against the corporation in tort.

B. ENFORCEMENT OF THE STATUTORY LIABILITY.

218. The statutory liability can be enforced by corporate creditors only — Stockholders and directors as creditors — Receivers — National banks.

219. Judgment, execution, etc., against the corporation, a condition precedent to the right to enforce the statutory liability.

§ 220. Difficulty in determining whether the creditor's remedy is at law or in equity — Special remedies.

221. The remedy at law.

222. The remedy in equity.

223. Enforcement of the statutory liability by means of courts in other states — Penal liabilities — Construction of liability created by another state.

224. How far the judgment against the corporation is conclusive of the creditor's claim.

225. Stockholder's miscellaneous defenses against his statutory liability — Defense of release, extension, and renewal — Defense of liability already paid — Defense of set-off — Defense as to interest — Defense of costs — Defense of statute of limitations — Other defenses.

226. Priority among creditors.

227-229. Contribution among stockholders.

A. EXTENT OF THE LIABILITY.

§§ 212, 213. *Statutory liability in general.*— Probably the most characteristic feature of a corporate existence is the fact that, by being a corporation, its stockholders are liable only for the par value of the stock held by them, and when that is once paid in money or property there is no further liability. This exemption from liability need not be declared in the charter, but arises from the very fact of incorporation. For this reason legislatures are very careful, in giving joint-stock companies special powers, to distinctly declare that the company shall not thereby become a corporation. The very fact of incorporation by itself releases subscribers for stock from all liability for corporate debts, except to the extent of their unpaid subscriptions.

The state legislatures, however, in many instances, desire to increase the liability of stockholders to corporate creditors. Accordingly, statutes are passed expressly declaring that the stockholders shall be liable for a specified sum, in addition to their unpaid subscriptions. This is called the statutory liability of stockholders. It rarely exists as regards stockholders in railroad corporations, but frequently exists in the case of manufacturing and various other corporations,¹ and nearly always exists as against stockholders in banks.

This additional liability may be imposed by the state constitution, or by the charter, or by a general statute. Where this liability is imposed by a provision existing at the time of the creation of the corporation, there is no doubt of its constitutionality. But where the liability is created by a statute or constitutional provision enacted after the corporation was incorporated, then there arise difficult questions of constitutional validity. A full discussion, however, of the constitutionality of such a statute is considered elsewhere.²

§ 214. *This liability is strictly construed and limited.*³—Inasmuch as all statutes creating an additional liability on the part of stockholders are in derogation of the common law, they are to be strictly construed. They are a wide departure from established rules, and, though supposed to be founded on considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute.⁴

¹ A complete statement of the liability of stockholders in various corporations in all the states and territories is given in Part VII, *infra*.

² See § 497, *infra*. It is constitutional for the legislature, at the time of enacting a general incorporating act, to provide for an extra liability of directors who make false reports. *Huntington v. Attrill*, 118 N. Y. 365 (1890).

³ *Wing v. Slater*, 35 Atl. Rep. 302 (R. I., 1896); *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634 (1895).

⁴ *Gray v. Coffin*, 63 Mass. 192 (1852); *O'Reilly v. Bard*, 105 Pa. St. 569 (1884); *Chase v. Lord*, 77 N. Y. 1 (1879);

Means's Appeal, 85 Pa. St. 75 (1877); *Dane v. Dane Mfg. Co.*, 80 Mass. 488 (1860); *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532 (1875); *Grose v. Hilt*, 36 Me. 22 (1853); *Coffin v. Rich*, 45 Me. 507 (1858); *Windham Provident Inst. v. Sprague*, 43 Vt. 502 (1871); *Dauchy v. Brown*, 24 Vt. 197 (1852); *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293 (1872); *Youghiogheny Shaft Co. v. Evans*, 72 Pa. St. 331 (1872); *Diven v. Lee*, 36 N. Y. 302 (1867); *Lowry v. Inman*, 46 N. Y. 119 (1871); *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52 (1878). *Cf.* *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380 (1874); *Ripley v. Sampson*, 27 Mass. 371 (1830); *Knowlton v. Ack-*

A statute imposing such a liability is not construed to apply to existing corporations unless the statute expressly so provides.¹ Hence, a provision of the general statutes imposing a personal liability upon directors of a corporation is not incorporated into a special charter by a clause declaring that that corporation shall possess all the general powers and privileges and be subject to all the liabilities conferred and imposed upon corporations organized under the general act.² And where Congress granted to a California corporation certain moneys, and took corporation bonds therefor, it being the clear intent of Congress, as shown by the statutes, to treat such California corporation as a part of a general plan for the building of a railroad through many states, the statutory liability of all stockholders in California corporations does not apply to such a debt.³

§ 215. *Particular statutes construed.*—The character, nature and extent of the liability imposed by constitutional provisions or by statute upon stockholders, in addition to their common-law liability, vary, of course, widely, and the extent of the liability created by each statute will depend entirely upon the particular words of the enactment.⁴ Occasionally, however, a provision imposing additional liability is found to be substantially repeated in the statutes of many states. Such is the case with the provision that stockholders shall be liable “to an amount equal to their stock.” This is construed to impose a double liability.⁵ When it has been enforced, each subscriber

ley, 62 Mass. 93 (1851); *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313 (1875); *Davidson v. Rankin*, 34 Cal. 503 (1868); *Mokelumne Hill, etc. Co. v. Woodbury*, 14 Cal. 265 (1859); *Dewey v. St. Albans Trust Co.*, 57 Vt. 332 (1885). A contrary rule seems to have been adopted in *Carver v. Braintree Mfg. Co.*, 2 Story, 432 (1843); S. C., 5 Fed. Cas. 235, where liability for debts contracted during membership was held to include “dues owing.” Also in *Rider v. Fritchey*, 49 Ohio St. 285 (1892); *Freeland v. McCullough*, 1 Denio, 414 (1845).

¹ See § 497, *infra*.

² *Park Bank v. Remsen*, 158 U. S. 337 (1895).

³ *United States v. Stanford*, 161 U. S. 412 (1896).

⁴ *Root v. Sinnock*, 120 Ill. 350 (1887), citing many cases; *Wheeler v. Millar*, 90 N. Y. 353, 359 (1882); *U. S. Trust Co. v. U. S. F. Ins. Co.*, 18 N. Y. 199, 218 (1858); *Ohio L. Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. (Tenn.) 1, 23 (1850); *Lewis v. St. Charles County*, 5 Mo. App. 225 (1878). *Cf. Briggs v. Penniman*, 8 Cow. 387 (1836); *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840).

⁵ A liability “to an amount equal to the amount of stock held by them respectively” has been construed to create the double liability. *Booth v. Campbell*, 37 Md. 522 (1872); *Mat-*

will have paid double for his stock — once on the subscription and once on the statutory liability.

Under a statute providing that "each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred, . . . for the recovery of which joint or several actions may be . . . prosecuted," it has been held that the liability of the shareholders is substantially that of partners, but may be enforced at law.¹ A general joint and several liability for all

thews v. Albert, 24 Md. 527 (1866); Norris v. Johnson, 34 Md. 485 (1871); Hager v. Cleveland, 36 Md. 476, 491 (1872). The former constitutional provision in Alabama that stockholders were "liable to the extent of their stock" meant a double liability. McDonnell v. Alabama, etc. Ins. Co., 85 Ala. 401 (1888). A liability of stockholders for "double" the amount of their stock means a liability once for the unpaid subscriptions and then an additional liability of twice the par value of the stock, making a triple liability altogether. Dreisbach v. Price, 133 Pa. St. 560 (1890). A liability "equally and ratably to the extent of their respective shares of stock" does not authorize a judgment against one for any more than his proportion. Buenz v. Cook, 15 Colo. 38 (1890). The constitution of Missouri formerly contained a provision, now repealed, imposing a double liability. Perry v. Turner, 55 Mo. 418 (1874); Provident Sav. Inst. v. Jackson Place, etc. Rink, 52 Mo. 553 (1873). A provision in the constitution of 1875, taken from an amendment of 1870, that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him," was construed in Schricker v. Ridings, 65 Mo. 208 (1877), to limit liability to unpaid subscriptions. But see Miller v. Great Republic Ins. Co., 50 Mo. 55 (1872); Ochiltree v. Railroad Co., 21 Wall. 249 (1874). A statute imposing a lia-

bility to the amount of the stock has been held in Texas to be merely declaratory of the subscription liability. Walker v. Lewis, 49 Tex. 123 (1878). A liability "to the amount of what remains unpaid upon his subscription to the capital stock" is declaratory and creates no liability beyond the subscription price. Burch v. Taylor, 1 Wash. St. 245 (1890); Root v. Sinnock, 120 Ill. 350 (1887). In Massachusetts, by statute, stockholders in manufacturing corporations are liable as tenants in common to creditors to the extent of the capital stock, until it has been divided into shares. Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385 (1869); S. C., 111 Mass. 200 (1872). Cf. Burnap v. Haskins Steam-engine Co., 127 Mass. 586 (1879); Hager v. Cleveland, 36 Md. 476 (1872); Norris v. Johnson, 34 Md. 485 (1871). But where some of the stock is held by the corporation itself, this will not compel the other shareholders to bear the statutory liability as to the stock so held by the corporation. Crease v. Babcock, 51 Mass. 525, 556 (1846).

¹ Davidson v. Rankin, 34 Cal. 503 (1868). Cf. Young v. Rosenbaum, 39 Cal. 646 (1870); Larrabee v. Baldwin, 35 Cal. 155 (1868); McAuley v. York Min. Co., 6 Cal. 80 (1856); Adkins v. Thornton, 19 Ga. 325 (1856) [this case is frequently miscited, owing to a misprint in the original report, as Dozier v. Thornton]; Branch v. Baker, 53 Ga. 502 (1874); Dane v.

the corporate debts makes the stockholders liable as partners, as though there had been no incorporation.¹ Under the provisions of the constitution and statutes of Ohio, and of other states, it is held that while the undertaking of the shareholder is not primary, and is to be resorted to only in case of the insolvency of the corporation, still the liability, when it does properly arise, is essentially that of partners.² This class of cases

Young, 61 Me. 160 (1872); *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1 (1830). *Cf. Fuller v. Ludden*, 87 Ill. 312 (1877); *Brown v. Hitchcock*, 36 Ohio St. 678 (1881). The constitutional and statutory liability of stockholders in California is a contract obligation, and may be enforced by attachment. *Kennedy v. California Sav. Bank*, 97 Cal. 93 (1892). The liability of a stockholder in a California bank for his proportion of a corporate debt was enforced at law in *Barling v. Bank of British North America*, 50 Fed. Rep. 260 (1892). *Southmayd v. Russ*, 3 Conn. 52 (1819); *Middletown Bank v. Magill*, 5 Conn. 28, 45 (1823); *Deming v. Bull*, 10 Conn. 409 (1835); *Conant v. Van Schaick*, 24 Barb. 87 (1857); *Allen v. Sewall*, 2 Wend. 327 (1829); *Moss v. Oakley*, 2 Hill, 265 (1842); *Harger v. McCullough*, 2 Denio, 119 (1846); *McCullough v. Moss*, 5 Denio, 567 (1846); *Corning v. McCullough*, 1 N. Y. 47 (1847); *Moss v. Averell*, 10 N. Y. 449 (1853); *Wiles v. Suydam*, 64 N. Y. 173, 176 (1876); *Conklin v. Furman*, 57 Barb. 484 (1865); *Abbott v. Aspinwall*, 26 Barb. 202 (1857); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *White v. Blum*, 4 Neb. 555 (1876); *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154 (1859); *Moies v. Sprague*, 9 R. I. 541 (1870); *Witherhead v. Allen*, 28 Barb. 661 (1859).

¹ *Planters' Bank v. Bivingsville Cotton Mfg. Co.*, 10 Rich. L. (S. C.) 95 (1856).

² And that although the stated extent of the shareholder's liability, as provided by the statute, cannot be

exceeded, still, up to the full measure of his liability, he may be charged, although it be shown that, if other solvent shareholders had contributed their full proportion, it would not be necessary for him to pay. *Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871); *Brown v. Hitchcock*, 36 Ohio St. 678 (1881); *Harpold v. Stobart*, 46 Ohio St. 397 (1889). This case holds also that a stockholder in Ohio "is liable to creditors of the corporation for such portion only of the debts existing while he held the stock and remaining due (not in excess of the amount of stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered." *Cf. Stewart v. Lay*, 45 Iowa, 604 (1877); *Crease v. Babcock*, 51 Mass. 525 (1846). In Wisconsin stockholders in banking corporations are liable by statute as original and principal debtors, substantially as though they were partners, except, as in Ohio, that the responsibility of each is limited to a sum equal to his shares of stock. *Coleman v. White*, 14 Wis. 700 (1862). Under the Wisconsin statute making stockholders liable for the debts where business is commenced before one-half the capital stock is subscribed and twenty per cent paid in, the statute allows suit without joining the corporation as a defendant. *Flour City Nat. Bank v. Wechselberg*, 45 Fed. Rep. 547 (1891).

holds that, unless the statute prescribes otherwise, the common-law rules as to the liability of partners, and the remedies for enforcing that liability, apply to the statutory liability of shareholders in incorporated companies.¹

A very common statutory liability is that which makes stockholders liable for debts due from the corporation to its servants or laborers. There has been difficulty in determining what persons are to be classed as servants, but the courts are not inclined to give a broad application to the word.²

¹*Story v. Furman*, 25 N. Y. 214, 221, 222 (1862); *New England Com. Bank v. Newport Steam Factory*, 6 R. I. 154, 189 (1859); *Moies v. Sprague*, 9 R. I. 541 (1870). It is sometimes held that a general statutory liability means a liability on the part of the stockholder only in the proportion which his interest bears to the total indebtedness of the corporation. *Boyd v. Hall*, 56 Ga. 563 (1876); *Reynolds v. Feliciana Steamboat Co.*, 17 La. Rep. 397 (1841). In such a case, where the shareholders are jointly and severally personally liable for debts contracted by the corporation, which it cannot or does not pay, in proportion to the number of shares they own, it seems to be settled that they are to be held principal debtors, and not mere sureties for the corporation. *Harger v. McCullough*, 2 Denio, 119 (1846); *Corning v. McCullough*, 1 N. Y. 47 (1847), the court saying that the stockholders stand towards the creditors "on the same ground and under the same responsibility . . . as they would if unincorporated have stood;" *Moss v. Averell*, 10 N. Y. 449 (1853); *Simonson v. Spencer*, 15 Wend. 548 (1836), sustaining the action for debt; *Bailey v. Bancker*, 3 Hill, 188 (1842), holding also that a creditor must sue a stockholder upon the original demand and not upon the judgment against the company; *Southmayd v. Russ*, 3 Conn. 52 (1819), holding that, since the liability is original, *scire facias* will not lie against a stockholder, but he must

be sued as if there were no incorporation; *Marcy v. Clark*, 17 Mass. 330 (1821). In Michigan it is held that they are sureties. *Hanson v. Donkersley*, 37 Mich. 184 (1877). *Cf. Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557 (1884). It has been held, also, that they are not sureties for each other. *Lane v. Harris*, 16 Ga. 217, 234 (1854); *Crease v. Babcock*, 51 Mass. 525 (1846). *Cf. Larrabee v. Baldwin*, 35 Cal. 155 (1868). This seems to be the rule, in general, as to all statutory liability. *Young v. Rosenbaum*, 39 Cal. 646 (1870); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Thompson v. Meisser*, 108 Ill. 359 (1884).

²It may be stated as the rule, that only those who perform menial or manual services are within the class contemplated in the statute; "that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence." *Wakefield v. Fargo*, 90 N. Y. 213, 217 (1882). *Cf. Adams v. Goodrich*, 55 Ga. 233 (1875). This overrules some of the earlier New York cases, *e. g.*, *Vincent v. Bamford*, 1 Jones & S. 506 (1871); *S. C.*, 12 Abb. Pr. (N. S.) 252, which held an engineer and foreman, who sometimes also acted as superintendent, to be a servant within the meaning of the rule; *Harris v. Norvell*, 1 Abb. N. Cas. 127 (1876), which

Many of the states have statutes rendering stockholders or directors liable to creditors unless certain reports or certificates

held a reporter employed by a newspaper company, and a city or assistant editor, if not an officer of the company, to be a servant; *Hovey v. Ten Broeck*, 3 Rob. (N. Y.) 316 (1865), holding an overseer and book-keeper within the protection of the act. The word "employees" includes salesmen on salaries. *Palmer v. Van Santvoord*, 153 N. Y. Rep. 612 (1897). A person who sets up a machine is an employee. *Palmer v. Van Santvoord*, 17 N. Y. App. Div. 194 (1897). A book-keeper is an "employee," that word being of a wider meaning than "laborers and operatives." *People v. Beveridge Brewing Co.*, 91 Hun, 313 (1895). Book-keepers, superintendents, and foremen paid by the month are not employees, operatives, and laborers entitled to prior payment under the New York statute. *Re Stryker*, 73 Hun, 327 (1893). The president is not a "workman or employee" in the sense of the New Jersey statute giving a preference. *Weatherby v. Saxony, etc. Co.*, 29 Atl. Rep. 326 (N. J., 1894). The salary of a general traveling agent is not a debt "owing for labor" and is not entitled to a preference. *Clark's Appeal*, 100 Mich. 448 (1894). A master-mechanic and superintendent of works is a servant or laborer. *Sleeper v. Goodwin*, 67 Wis. 577 (1887). A superintendent of laborers is a "laborer" himself. *Pendergast v. Yandes*, 124 Ind. 159 (1890). An expert employed to adjust and start the machinery is entitled to the statutory lien for "labor." *Black's Appeal*, 83 Mich. 513 (1890). A traveling salesman is a "clerk" within the meaning of the statute rendering stockholders liable for debts to "clerks," etc. *Hand v. Cole*, 88 Tenn. 400 (1890).

The following employees have been held not to be servants or laborers

within the protection of the rule: The secretary of a manufacturing company. *Coffin v. Reynolds*, 37 N. Y. 640 (1868), overruling *Richardson v. Abendroth*, 43 Barb. 163 (1864), and perhaps *Williamson v. Wadsworth*, 49 Barb. 294 (1867), which is the case of a civil engineer and traveling agent at a fixed salary. A civil engineer. *Pennsylvania, etc. R. R. v. Leuffer*, 84 Pa. St. 168 (1877). *Contra*, *Conant v. Van Schaick*, 24 Barb. 87 (1857). *Cf. Williamson v. Wadsworth*, 49 Barb. 294 (1867). A consulting engineer. *Ericsson v. Brown*, 38 Barb. 390 (1862). An assistant chief engineer. *Brockway v. Innes*, 39 Mich. 47 (1878). *Cf. Peck v. Miller*, 39 Mich. 594 (1878). An overseer on a plantation. *Whitaker v. Smith*, 81 N. C. 340 (1879). *Contra*, *Hovey v. Ten Broeck*, 3 Rob. (N. Y.) 316 (1865). A contractor. *Rogers v. Dexter, etc. R. R.*, 85 Me. 372 (1893); *Boutwell v. Townsend*, 37 Barb. 205 (1860); *Aikin v. Wasson*, 24 N. Y. 482 (1862); *Balch v. New York, etc. R. R.*, 46 N. Y. 521 (1871); *Atcherson v. Troy, etc. R. R.*, 6 Abb. Pr. (N. S.) 329 (1856). *Cf. Kent v. New York Cent. R. R.*, 12 N. Y. 628 (1855); *McCluskey v. Cromwell*, 11 N. Y. 593 (1854). An agent of a mining corporation employed to take charge of its mines in a foreign country. *Hill v. Spencer*, 61 N. Y. 274 (1874); *Dean v. De Wolf*, 16 Hun, 186 (1878); *Krauser v. Ruckel*, 17 Hun, 463 (1879). A book-keeper and general manager. *Wakefield v. Fargo*, 90 N. Y. 213 (1882). A superintendent. *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875). *Cf. Gordon v. Jennings*, L. R. 9 Q. B. D. 45 (1882). And compare also *Gurney v. Atlantic, etc. R'y*, 58 N. Y. 358 (1874). Counsel is not an "employee." *Louisville, etc. R. R. v. Wilson*, 138 U. S. 501 (1891). A contractor is not an employee

are filed,¹ and the statutes often impose a personal liability on the directors for making loans in excess of the capital

under the Indiana statute. *Vane v. Newcombe*, 132 U. S. 220 (1889). A statutory preference to servants and employees gives no preference to the secretary. *Wells v. Southern Minn. R'y*, 1 Fed. Rep. 270 (1880). In general, only manual or menial laborers are protected by the statute. *Adams v. Goodrich*, 55 Ga. 233 (1875); *People v. Remington*, 45 Hun, 329 (1887). Cf. *Heebner v. Chave*, 5 Pa. St. 115 (1847); *Harrod v. Hamer*, 32 Wis. 162 (1873).

Under the mechanic's lien laws of the several states, a wider meaning has been given to the word "laborers." These cases are frequently confused with the statutes considered herein. *Stryker v. Cassidy*, 76 N. Y. 50 (1879); *Mutual Benefit L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389 (1875); *Bank of Pennsylvania v. Gries*, 35 Pa. St. 423 (1860); *Arnoldi v. Gouin*, 22 Grant, Ch. (Up. Can.) 314 (1875); *Mulligan v. Mulligan*, 18 La. Ann. 20 (1866); *Knight v. Norris*, 13 Minn. 473 (1868); *Raeder v. Bensberg*, 6 Mo. App. 445 (1879); *Foushee v. Grigsby*, 12 Bush (Ky.), 75 (1876); *Smallhouse v. Kentucky, etc. Co.*, 2 Mont. 443 (1876); *Capron v. Strout*, 11 Nev. 304 (1876). The mere fact that one does some manual labor incidental to his position as manager or foreman or superintendent will not constitute him a laborer within the intent of these statutes. *Krauser v. Ruckel*, 17 Hun, 463 (1879); *Ericsson v. Brown*, 38 Barb. 390 (1862). Cf. *Wakefield v. Fargo*, 90 N. Y. 213 (1882). But where a foreman did so much manual labor that it was not a mere incident of his foremanship, it was held that he might recover as a laborer. *Short v. Medberry*, 29 Hun, 39 (1883). For construction of the Pennsylvania liability for labor and supplies, see *Weiss v. Mauch Chunk Iron Co.*, 58 Pa. St. 295 (1868); *Reading Industrial Mfg.*

Co. v. Graeff, 64 Pa. St. 395 (1870); *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293 (1872), where a statute imposing liability for debts due workmen, etc., and materials furnished was construed not to include debts for hauling, repairing wagons, lumber for erecting machinery, powder for blasting, etc.; *Weigley v. Coal Oil Co.*, 5 Phila. 67 (1862). A claim against stockholders on their statutory liability to laborers is assignable. *Day v. Vinson*, 78 Wis. 198 (1890). A laborer having recourse by statute against stockholders may assign his rights. *Day v. Buckingham*, 87 Wis. 215 (1894). The liability for debts to laborers applies to such debts though due to non-residents. *Clokus v. Hollister Min. Co.*, 92 Wis. 325 (1896). A person having a claim against a director on a liability of the latter, created by statute, may assign that claim, and the assignee may enforce it. *Bedford v. Sherman*, 68 Hun, 317 (1893).

¹As to whether this liability is a penal liability, see § 223, *infra*. Cases on statutes of this character are given throughout this chapter. The following cases may also aid in giving an idea of this kind of liability: Under a statute rendering the stockholders liable to corporate creditors to the extent of the unpaid portion of the par value of their stock, unless a true statement of the affairs of the company is made annually, the stockholders are so liable if the statement which is filed is a false statement. *Congdon v. Winsor*, 17 R. I. 236 (1891), refusing to follow *Stedman v. Eveleth*, 47 Mass. 114 (1843). There is no debt existing for goods bought until the goods are delivered, under the Rhode Island statute making the stockholders liable for failure to file a report. *Wing v. Slater*, 35 Atl. Rep.

stock.¹ A liability imposed by a constitution may or may not be self-executing without any statutory provision, according to

302 (R. I., 1896). Directors are not liable by statute requiring an annual report, where such report is filed, even though it be false. If the statute makes them liable for knowingly making a false report, knowledge must be averred. *Matthews v. Patterson*, 16 Colo. 215 (1891). This statutory liability of directors for failure to file reports is not avoided by the fact that the company is insolvent and has gone out of business. *Gans v. Switzer*, 9 Mont. 408 (1890). The California statute, allowing any stockholder to collect \$1,000 from the directors in a mining company if they failed to post a balance sheet monthly, was construed in *Ball v. Tolman*, 51 Pac. Rep. 546 (Cal., 1897). A statutory liability of officers for a false report applies only to debts created after the false report is made. *Torbett v. Godwin*, 62 Hun, 407 (1891). Where the directors of a mining corporation are liable for \$1,000 unless they file weekly reports of the receipts, disbursements, number of employees, and wages, no damage need be proved by a stockholder in suing for the \$1,000. *Shanklin v. Gray*, 111 Cal. 88 (1896); *Miles v. Woodward*, 115 Cal. 308 (1896). The statutory liability of directors for corporate debts, where they fail to give notices of the debts of the company, is not available to any creditors except those giving credit after the directors should have given notice. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (1893). "Wilful neglect" or refusal does not arise from mere neglect of a director under a statute calling for an annual report. *Gennert v. Ives*, 102 Mich. 547 (1894).

¹ Where directors are liable for corporate debts in excess of the subscribed capital stock, the capital stock includes that paid for by property as

well as in cash. *Moore v. Lent*, 81 Cal. 502 (1889). In enforcing a liability of directors for debts in excess of the capital, a creditor must sue for the benefit of all, and can recover only a proportion of the excess over such capital stock. *Anderson v. Speers*, 21 Hun, 568 (1880). A director cannot enforce a statutory liability of the directors for debts contracted by the corporation in excess of the capital stock, the directors being liable "jointly and severally" by statute; but such debt due to the director is counted. *Thacher v. King*, 156 Mass. 490 (1892). Where the constitution of an unincorporated association limits the debts and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders. *McFadden v. Leeka*, 48 Ohio St. 513 (1891). The liability of directors in New York for excessive debts can be enforced only in a suit in which all the directors are joined. *Milsom, etc. Co. v. Baker*, 16 N. Y. App. Div. 581 (1897). The statutory liability of stockholders for a failure to file a certificate that the capital stock has been fully paid, and the statutory liability of directors for debts in excess of the capital stock, do not apply to a judgment in an action of tort. *Leighton v. Campbell*, 17 R. I. 51 (1890). As to the liability of directors of a national bank for loans in excess of the amount allowed by law, see *Witters v. Sowles*, 43 Fed. Rep. 405 (1890); *Stephens v. Overstolz*, 43 Fed. Rep. 771 (1890). The liability of directors under the National Banking Act for loans to separate persons of amounts in excess of one-tenth of the capital stock can be enforced only in a court of equity. *Welles v. Graves*, 41 Fed. Rep. 459 (1890); *Peters v. Foster*, 56 Hun, 607 (1890). As regards the rem-

the wording of the provision itself.¹ An increase or reduction of the capital stock leads often to complications in addition to the usual ones incident to the statutory liability.² Various decisions on the liability of stockholders and directors under particular statutes are given in the notes below.³

edy under the National Bank Act, see *Kennedy v. Gibson*, 8 Wall. 498 (1869); *Casey v. Galli*, 94 U. S. 673 (1876), and Act of June 30, 1876, ch. 44; *Witters v. Sowles*, 32 Fed. Rep. 767 (1887); *Richmond v. Irons*, 121 U. S. 27 (1887), as to joinder of causes of action.

¹ A constitutional liability may not be enforceable where no statute has been passed to enforce it; as, for example, the provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." *Morley v. Thayer*, 3 Fed. Rep. 737 (1880). Under the Ohio constitutional provision imposing a liability on stockholders, a general act authorizing incorporations must contain a provision to that effect or the act will be void. *State v. Sherman*, 22 Ohio St. 411 (1872). A constitutional provision that stockholders shall be liable to the extent of their stock is self-executing and applies to all corporations. It renders them liable to the extent of the par value of their stock in addition to the liability on subscriptions. A release to the corporation does not release this statutory liability. *Willis v. Mabon*, 48 Minn. 140 (1892). The Kansas constitution is self-enforcing as to stockholder's liability. *Sterne v. Atherton*, 51 Pac. Rep. 791 (Kan., 1898); *Fowler v. Lamson*, 146 Ill. 472 (1893). The Nebraska constitutional provision imposing a double liability on stockholders in banks is self-executing. *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353 (1896). The New York constitutional provision imposing a

double liability on stockholders is not self-executing. *Marshall v. Sherman*, 149 N. Y. 9 (1895). The constitutional liability of stockholders in California is not self-executing. A statute which applies it "in proportion" to the amount of stock held by each stockholder is too vague for enforcement. *United States v. Stanford*, 69 Fed. Rep. 25 (1895).

² See §§ 288, 289, *infra*, concerning this subject.

³ Under the Illinois statute making directors liable for debts before the statute is complied with as to incorporation, and the issue by the secretary of state of a certificate of completed organization and recording of the same in the county where the principal office is, the directors are liable if such certificate is not so recorded. Liability may be enforced even by a corporate creditor who has filed his claim with an assignee of the corporation for the benefit of its creditors. *Loverin v. McLaughlin*, 161 Ill. 417 (1896). The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others. *Richter v. Henningsan*, 110 Cal. 530 (1895). A statute may require the word "limited" to be a part of the corporate name, and may render the stockholders personally liable for omitting the same. *Lehman v. Knapp*, 48 La. Ann. 1144 (1896). "Dues" include corporate liability for personal injuries. *Flenniken v. Marshall*, 43 S. C. 80 (1895). The liability of stockholders under the Michigan statute, relative

It remains to add that this class of statutes, except in the case of banks, have on the whole proved signal failures. They drive corporations from a state, are rarely relied upon by creditors, and are productive of incessant litigation.

to goods sold, is applied in *Kirkpatrick v. Mehalitch*, 71 N. W. Rep. 1077 (Mich., 1897). There is no statutory liability of stockholders in ordinary corporations in New Jersey. *Thomson, etc. Co. v. Murray*, 37 Atl. Rep. 443 (N. J., 1897). Under the Iowa statutes the stockholders are liable as partners where the certificate of incorporation failed to state the highest amount of indebtedness which the company might incur. *Heuer v. Carmichael*, 82 Iowa, 288 (1891). "Dues" include insurance policies. *McDonnell v. Alabama, etc. Ins. Co.*, 85 Ala. 401 (1888). The case of *Austin v. Berlin*, 13 Colo. 198 (1889), holds that new directors are not liable for the statutory delinquencies of the old. A debt contracted in the midst of acts for which directors are liable by statute is contracted "after such violation." *Patterson v. Stewart*, 41 Minn. 84 (1889). In Maine, by statute, stockholders are liable as subscribers if their stock is paid for by property taken at an overvaluation. *Libby v. Tobey*, 82 Me. 397 (1890). Under the Iowa statute rendering officers, etc., liable for diversion of funds, a policyholder may recover, where a consolidation with another company has been made and plaintiff was excluded from the new company. *Grayson v. Willoughby*, 78 Iowa, 83 (1889). A complaint to enforce a stockholder's liability for labor done in the construction of the road is not good if it omits the allegation as to the construction of the road. *Toner v. Fulkerson*, 125 Ind. 224 (1890). Where stockholders are liable for debts other than mortgage debts, an agreement of the company to pay another company's mortgage debt is not a mort-

gage debt of its own such as would exempt its stockholders from liability. *Barron v. Paine*, 83 Me. 312 (1891). Where the constitution renders the stockholders liable doubly except in manufacturing and mechanical corporations, a statute exempting from liability the stockholders in companies engaged in dealing in mineral lands is unconstitutional. *Anderson v. Anderson Iron Co.*, 65 Minn. 281 (1896). The double liability in Minnesota on all stockholders excepting corporations engaged in manufacturing or mechanical business does not apply to a mining corporation, that being a mechanical business. *Cowling v. Zenith Iron Co.*, 65 Minn. 263 (1896). The constitutional liability of stockholders applies if a part of the business as set forth in the charter consists of mercantile business. The objection that all stockholders and creditors are not joined must be raised by answer. *Densmore v. Shepard*, 46 Minn. 54 (1891). Where stockholders are liable unless the corporation is a manufacturing corporation, they are liable if the corporation is to manufacture and "deal" in certain articles. *Commercial Bank v. Azotine, etc. Co.*, 69 N. W. Rep. 217 (Minn., 1896). The Minnesota statutory liability, being absolute, will not be construed as a proportionate liability only (*First Nat. Bank v. Winona Plow Co.*, 58 Minn. 167—1894), where the stockholders not made parties are shown to be insolvent, dead, or beyond the reach of process. *Clarke v. Cold Spring, etc. Co.*, 58 Minn. 16 (1894). The statutory liability of officers of corporations in Minnesota for any "unfaithfulness" means "unfaithfulness" to the creditor who is suing.

§ 216. *Waiver by corporate creditors of their statutory rights against shareholders.*—A corporate creditor may, by express contract, when the debt is incurred, waive his right to collect from the stockholder debts which the corporation fails to pay.¹ And the corporation in its contracts with third persons may, if it is held in England, lawfully stipulate for the exemption of its members from the liability imposed upon them by statute in the event of the insolvency of the corporation.²

This suit may be at law. *First Nat. Bank v. Harper*, 61 Minn. 375 (1895). Where stockholders in manufacturing corporations are not liable, but in other companies are liable, under a statute, yet, if the charter authorizes other business than manufacturing, they are liable although only the manufacturing business is pursued. *Arthur v. Willius*, 44 Minn. 409 (1890).

¹Quoted and approved in *Bush v. Robinson*, 95 Ky. 492 (1894); *Robinson v. Bidwell*, 22 Cal. 379 (1863); *French v. Teschemaker*, 24 Cal. 518 (1864); *Basshor v. Forbes*, 36 Md. 154 (1872); *Brown v. Eastern Slate Co.*, 134 Mass. 590 (1888), where the waiver was oral. A creditor may, by express contract, waive his right to compel stockholders to pay their unpaid subscriptions. *Bush v. Robinson*, 95 Ky. 492 (1894). A corporate creditor's agreement that stockholders should not be individually liable on a debt does not relieve directors from their statutory liability, and the court intimated that it would not have been legal if it had relieved the directors from their liability. *Swancoat v. Remsen*, 78 Fed. Rep. 592 (1897). An oral agreement prior to incorporation that the stockholders should not be personally liable is not binding on the creditors. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896). In *United States v. Stanford*, 70 Fed. Rep. 346 (1895), the court held that the complainant had by its acts waived the statutory liability of a

stockholder in a California corporation. Corporate creditors may waive the stockholders' statutory liability. *Wells v. Black*, 117 Cal. 157 (1897). A partnership may, by contract with a party with whom it is dealing, limit the liability of the partners. *Sentell v. Hewitt*, 22 S. Rep. 970 (La., 1898). Where the party loaning money to the association agrees orally to rely on it alone, he cannot afterwards hold its officers liable. *Elwell v. Tatum*, 6 Tex. Civ. App. 397 (1893).

²*Re Athenæum L. Ass. Soc.*, 3 De G. & J. 660 (1859); *Halket v. Merchant Traders', etc. Assoc.*, 13 Q. B. 960 (1849); *Durham's Case*, 4 Kay & J. 517 (1858). Cf. *Shelford, Joint-stock Companies* (2d London ed.), 4. Where the agreement limits the liability of members to the unpaid part of their stock, a stockholder who is also a creditor cannot collect in excess of this par value. So also with a bank, one of whose members is a stockholder. *In re Worcester, etc. Co.*, 3 De G., M. & G. 180 (1853). Although the subscribers themselves may stipulate with each other for such a restricted liability, nothing is more clear than that, as to the rest of the world, each shareholder is liable for the whole amount of the debts of the company. Nor will notice that a stipulation of this kind has been entered into between the shareholders prevent a creditor from holding each of them liable to the full extent of his demand. See *Greenwood's Case*,

It has been held to be competent for any one dealing with the company to contract to hold the shareholders responsible to only a limited extent, to no extent at all, or to any specified extent mutually agreed upon.¹ A by-law cannot release stockholders from their statutory liability.²

3 De G., M. & G. 459 (1854); *Re State Fire Ins. Co.*, 1 N. R. 510 (V.-C. W., 1863).

¹ *Re State F. Ins. Co.*, 1 Hem. & M. 457 (1863); S. C., 1 De G., J. & S. 634; 36 L. J. (Ch.) 634; 34 L. J. (Ch.) 436; *Hassell v. Merchant Traders' Assoc.*, 4 Exch. 525 (1849); *Talbot's Case*, 5 De G. & Sm. 386 (1852); S. C., 21 L. J. (Ch.) 846. See also *Reid v. Allan*, 4 Exch. 326 (1849); S. C., 19 L. J. (Exch.) 39. And compare *Re Independent Assurance Co.*, 1 Sim. (N. S.) 54 (1850); *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925 (1851); S. C., 20 L. J. (Q. B.) 417; *Peddell v. Gwyn*, 1 Hurl. & N. 590 (1857); S. C., 26 L. J. (Exch.) 199; *Gordon v. Sea F. & L. Ass. Soc.*, 1 Hurl. & N. 599 (1857); S. C., 26 L. J. (Exch.) 202. And see *Hess v. Werts*, 4 Serg. & R. (Pa.) 356, 361 (1818); *King v. Accumulative, etc. Ass. Co.*, 3 C. B. (N. S.) 151 (1857). *Cf. Hallett v. Dowdall*, 18 Q. B. (N. S.) 2 (1852). The mere fact that the articles of association of an unincorporated company provide against personal liability is no defense, even though the contracts say that they are subject to the provisions in such articles. *Sullivan v. Campbell*, 2 Hall (N. Y.), 271 (1829); *Hess v. Werts*, 4 Serg. & R. (Pa.) 356 (1818); *Greenwood's Case*, 3 De G., M. & G. 459 (1854). They are liable, even though their articles of association provided otherwise. *Manning v. Gasharie*, 27 Ind. 399 (1866). The unincorporated association is a partnership "and subject to the rules governing that branch of the law." But if the by-laws limit the amount of debts which the directors may incur, and they exceed it, they can-

not have contribution from non-assenting stockholders. *McFadden v. Leeka*, 48 Ohio St. 513 (1891). The same rule prevails in an ordinary co-partnership. *Bromley v. Elliot*, 38 N. H. 287 (1859). Directors are bound to know of the restriction and have no recourse to the stockholders; nor does a firm in which a director is a member. *Re Worcester Corn Exch. Co.*, 3 De G., M. & G. 180 (1853). A contract that promoters shall not be personally liable binds an engineer. *Landman v. Entwistle*, 7 Exch. 632 (1852). Where promoters stipulate that they shall not be liable, the party who tacitly assents to that condition is bound. *Giles v. Smith*, 11 Jur. 334 (1847). See also ch. XLIII, *infra*; 3 Kent, Com. 27; *Story, Partn.*, § 164. A contrary doctrine seems to have prevailed in *Davis v. Beverly*, 2 Cranch, C. C. (U. S.) 35 (1811); S. C., 7 Fed. Cas. 112; *Riggs v. Swann*, 3 Cranch, C. C. 183 (1827); S. C., 20 Fed. Cas. 788; reversed on another point by *Mandeville v. Riggs*, 2 Pet. 482 (1829). The exemption from liability must be clearly proved. *Skinner v. Dayton*, 19 Johns. 513, 537 (1822). A stipulation against holding stockholders liable has been held to refer to statutory liability and not to the subscription liability. *Preston v. Cincinnati, etc. R. R.*, 36 Fed. Rep. 54 (1888). A provision in an insurance policy that the directors shall not be liable, although the statute makes them liable, is not good. *Greene v. Walton*, 59 Hun, 102, 618 (1891).

² *Wells v. Black*, 117 Cal. 157 (1897). See also 74 N. W. Rep. 1083 (Neb., 1898).

§ 217. *Statutory liability not enforceable to pay damages recovered against the corporation in tort.*—The statutory liability imposed upon the shareholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot, therefore, be enforced to pay damages recovered against the corporation in an action in tort.¹

B. THE ENFORCEMENT OF THE LIABILITY.

§ 218. *The statutory liability can be enforced by corporate creditors only — Stockholders and directors as creditors — Receivers — National banks.*—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it.

¹ *Heacock v. Sherman*, 14 Wend. 58 (1835). In this case the stockholders in a company which owned a bridge, and against which a judgment had been recovered for damages because the bridge was out of repair, were held not to be liable upon such a demand, since the act imposing a personal liability upon them contemplated a liability only for demands arising *ex contractu*. In general, the word "debt," as used in statutes imposing a personal liability upon stockholders, is construed to include only liabilities arising *ex contractu*, and not to include liability for damages recovered against the corporation in actions sounding in tort. *Child v. Boston, etc. Iron Works*, 137 Mass. 516 (1884), where a judgment for infringement of patent was not enforced; *Leighton v. Campbell*, 17 R. I. 51 (1890); *Mill Dam Foundry v. Hovey*, 38 Mass. 417, 455 (1839), sustaining an unliquidated claim for damages; *Dryden v. Kellogg*, 2 Mo. App. 87 (1876), enforcing a judgment for breach of warranty of title; *Doolittle v. Marsh*, 11 Neb. 243 (1881);

Esmond v. Bullard, 16 Hun, 65 (1878); S. C. affirmed *sub nom.* *Losee v. Bullard*, 79 N. Y. 404 (1880); *Archer v. Rose*, 3 Brewst. (Pa.) 264 (1871); *Cable v. McCune*, 26 Mo. 371 (1858), defeating a judgment for damages for loss of a steamboat; *Bohn v. Brown*, 33 Mich. 257, 263 (1876), refusing to enforce herein a judgment against a common carrier for negligence. *Cf. Stanton v. Wilkeson*, 8 Ben. 357 (1876); S. C., 22 Fed. Cas. 1074; *Chase v. Curtis*, 113 U.S. 452 (1885); *Carver v. Braintree Mfg. Co.*, 2 Story, 432, 448 (1843); S. C., 5 Fed. Cas. 235; *Wyman v. American Powder Co.*, 62 Mass. 168, 182 (1851); *Zimmer v. Schleeauf*, 115 Mass. 52 (1874). But the stockholders' *subscription* liability may be enforced to pay damages arising from torts. *Powell v. Oregonian R'y*, 36 Fed. Rep. 726 (1888); 38 Fed. Rep. 187. The word "dues," as contained in the Ohio constitution, rendering stockholders individually liable, renders them liable not only on contracts of the corporation, but on torts committed by the corporation. *Rider v. Fritchey*, 49 Ohio St. 285 (1892).

It cannot enforce it by an assessment upon the shareholders.¹ Nor can the corporation, upon the insolvency, assign it to a trustee for the benefit of creditors.² It is a liability running directly and immediately from the shareholders to the corporate creditors.³ Accordingly, a receiver of an insolvent corporation, invested with "all the estate, property, and equitable interests" of the concern, has no power to enforce such a liability as this.⁴ An assignee of an insolvent corporation for the

¹ *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Liberty Female College Assoc. v. Watkins*, 70 Mo. 13 (1879).

² *Wright v. McCormack*, 17 Ohio St. 86, 95 (1866); *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435 (1875); S. C., 8 Fed. Cas. 152. See also *Cuykendall v. Corning*, 88 N. Y. 129 (1882).

³ *Bristol v. Sanford*, 12 Blatchf. 341 (1874); S. C., 4 Fed. Cas. 163; *Lane v. Morris*, 8 Ga. 468 (1850); *Arenz v. Weir*, 89 Ill. 25 (1878). This was an action by a judgment creditor against a stockholder after a distribution of corporate assets by a receiver. The creditor was held to stand "on an independent platform, above that of the receiver, having no concern with the corporation, and the stockholder is bound, under the law, to answer to him." In Tennessee a corporate creditor having security for his debt cannot enforce the stockholder's statutory liability. *Albitztiqui v. Guadalupe, etc. Co.*, 92 Tenn. 598 (1893).

⁴ *Hancock Nat. Bank v. Ellis*, 166 Mass. 414 (1896); *Minneapolis, etc. Co. v. City Bank*, 69 N. W. Rep. 331 (Minn., 1896); *Billings v. Robinson*, 94 N. Y. 415 (1884); *Farnsworth v. Wood*, 91 N. Y. 308 (1883); *Cuykendall v. Corning*, 88 N. Y. 129 (1882); *Arenz v. Weir*, 89 Ill. 25 (1878); *Jacobson v. Allen*, 20 Blatchf. 525 (1882); *Cutting v. Damerel*, 88 N. Y. 410 (1882); *Bauer v. Platt*, 72 Hun, 326 (1893). Cf. *Davis v. Gray*, 16 Wall. 203 (1872); *Attorney-General v. Guardian, etc. Ins. Co.*, 77 N. Y. 272 (1879). Receivership of corporation does not prevent creditors

enforcing directors' liability. *Patterson v. Stewart*, 41 Minn. 84 (1889). That it is doubtful whether corporate creditors may sue to enforce directors' statutory liability after a receiver has gone in, see *Minnesota, etc. Mfg. Co. v. Langdon*, 44 Minn. 37 (1890). The statutory liability cannot be enforced in the receivership proceedings. The creditor must institute an independent suit. *Spilman v. Mendenhall*, 57 N. W. Rep. 468 (Minn., 1894). The creditor may proceed to judgment though a receiver has been appointed. *Mason v. N. Y. Silk Mfg. Co.*, 27 Hun, 307 (1882). In *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353 (1896), the court intimated that a receiver could bring the suit where the liability is for the benefit of all the creditors ratably. The court may authorize a receiver to enforce the statutory liability of stockholders under the Ohio statute. *Zieverink v. Kemper*, 50 Ohio St. 208 (1893). In *Cushing v. Perot*, 175 Pa. St. 66 (1896), the court held that a receiver and not a corporate creditor is the proper party to enforce the statutory liability; but this conclusion was arrived at in defeating the statutory liability of a Pennsylvania stockholder in a Kansas corporation. In Washington the statutory liability of stockholders in banks can be enforced only by a receiver. *Watterson v. Masterson*, 15 Wash. 511 (1896); *Wilson v. Book*, 13 Wash. 676 (1896). Even though the receiver does not file a bill to enforce the statutory

benefit of its creditors cannot enforce the statutory liability of stockholders.¹ An agent selected by the stockholders of an insolvent national bank to wind up the bank cannot enforce the statutory liability.² The action to enforce can be maintained only by the creditors themselves, in their own right and for their own benefit.³

It has been held that the statutory liability of stockholders cannot be enforced by the directors as "creditors."⁴

It is uncertain whether a stockholder, who is also a creditor of the corporation, can bring an action at law against his co-stockholders to enforce a statutory liability. In Massachusetts,⁵ Illinois,⁶ and New York⁷ the rule is settled that such an action

liability until more than six years after his appointment, yet the statute of limitations may not be a bar. *Andrews v. Bacon*, 38 Fed. Rep. 777 (1889). In Minnesota by statute a receiver may enforce the statutory liability. *Ueland v. Haugan*, 73 N. W. Rep. 169 (Minn., 1897). And a creditor will not be allowed to sue except by leave of the court. *Anderson v. Seymour*, 73 N. W. Rep. 171 (Minn., 1897). A receiver may enforce the statutory liability of stockholders in a bank organized under the Iowa statutes. *State v. Union, etc. Bank*, 70 N. W. Rep. 752 (Iowa, 1897). A receiver can enforce the statutory liability of stockholders in a Washington bank inasmuch as the statutes so provide. It is no defense that the stockholder was induced to subscribe by fraud. *Sheafe v. Larimer*, 79 Fed. Rep. 921 (1897). In a suit by a receiver to enforce a statutory liability under the Iowa statutes, any matter determined at the time of the assessment cannot be disputed by the stockholder. *State v. Union, etc. Bank*, 72 N. W. Rep. 1076 (Iowa, 1897).

¹ *Runner v. Dwiggs*, 46 N. E. Rep. 580 (Ind., 1897).

² *Church v. Ayer*, 80 Fed. Rep. 543 (1897).

³ *Farnsworth v. Wood*, 91 N. Y. 308

(1883). See also *Mason v. New York Silk Mfg. Co.*, 27 Hun, 307 (1882); *Billings v. Trask*, 30 Hun, 314 (1883); *Walker v. Crain*, 17 Barb. 119, 128 (1853); *Story v. Furman*, 25 N. Y. 214 (1862); *Cuykendall v. Corning*, 88 N. Y. 129 (1882); *Herkimer County Bank v. Furman*, 17 Barb. 116 (1853); *Hurd v. Tallman*, 60 Barb. 272 (1871).

⁴ *McDowall v. Sheehan*, 129 N. Y. 200 (1891). A director who is a creditor cannot in certain cases share with the other creditors and prove a claim due to him from the corporation. Neither can such claim be proved where it belongs to a firm or company of which the director was a member, or to the assignee of such firm or company. *Thacher v. King*, 156 Mass. 490 (1892).

⁵ *Thayer v. Union Tool Co.*, 70 Mass. 75 (1855). See 53 Pac. Rep. 756.

⁶ *Meisser v. Thompson*, 9 Ill. App. 368 (1881); *S. C., Thompson v. Meisser*, 108 Ill. 359 (1884).

⁷ *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Clark v. Myers*, 11 Hun, 608 (1877); *Bailey v. Bancker*, 3 Hill, 188 (1842) (overruling upon this point *Simonson v. Spencer*, 15 Wend. 548—1836); *Beers v. Waterbury*, 8 Bosw. 396 (1861); *Richardson v. Abendroth*, 43 Barb. 162 (1864); *Deming v. Puleston*, 33 N. Y. Super. Ct. 231 (1871). *Cf. Sanborn v. Lefferts*, 58 N. Y. 179

cannot be maintained. In those jurisdictions the only remedy for such a creditor in such a case is by a bill in equity for contribution.¹ But in Pennsylvania,² Maine,³ Minnesota,⁴ and California⁵ the rule is otherwise, and it is no objection to the creditor's action that he is himself also a shareholder.⁶ Where an insolvent bank in the hands of a receiver is indebted to a stockholder, and the stockholder is also insolvent, the court will not allow such stockholder to participate in the distribution of the assets, but will offset his interest in the assets against his statutory liability on the stock, even though the stockholder has assigned to another his interest in the assets.⁷

Stockholders in national banks are subject to a double liability. Not only that, but if at any time the capital stock of the bank becomes diminished by losses, the comptroller of the currency may compel the stockholders to either discontinue business or assess themselves to replace the loss.⁸ An assessment levied by stockholders in a national bank upon themselves, in accordance with the order of the comptroller, cannot be col-

(1874); *Garrison v. Howe*, 17 N. Y. 458 (1858). To same effect, *Perkins v. Sanders*, 56 Miss. 733 (1879). *Cf.* *Slee v. Bloom*, 5 Johns. Ch. 366, 382 (1821).

¹ But see *Potter v. Stevens Machine Co.*, 127 Mass. 592 (1879); *Savings Assoc. v. O'Brien*, 51 Hun, 45 (1889), and § 218, *infra*.

² *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43 (1864).

³ *Fowler v. Robinson*, 31 Me. 189 (1850).

⁴ *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896); 75 N. W. Rep. 232.

⁵ *Brown v. Merrill*, 107 Cal. 446 (1895); *Knowles v. Sandercock*, 107 Cal. 629 (1895).

⁶ In a suit in equity to enforce stockholders' statutory liability, a plea that the decedent of one of the complainants was also a stockholder, and no offer to pay his liability had been made, is not a good plea. *Newberry v. Robinson*, 41 Fed. Rep. 458 (1890). In New York it seems that the assignee of a judgment may bring the suit to enforce statutory

liability, though the assignee be a stockholder. *Woodruff, etc. Iron Works v. Chittenden*, 4 Bosw. 406 (1859). See also *Garrett v. Sayles*, 1 Fed. Rep. 371 (1880); *aff'd*, 110 U. S. 288; *Potter v. Stevens Machine Co.*, 127 Mass. 592 (1879).

⁷ *King v. Armstrong*, 50 Ohio St. 222 (1893). Where a stockholder is also a creditor, the court will offset his liability against his claims so far as possible. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896). Where by the charter the stockholders are liable for all debts, and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure. *Shaw v. Saranac, etc. Co.*, 78 Hun, 7 (1894). The receiver cannot set off a stockholder's statutory liability or debts against a claim by a party whose money was deposited in the stockholder's name. *Fisher v. Knight*, 61 Fed. Rep. 491 (1894).

⁸ See U. S. Rev. Stat., § 5205.

lected by suit, inasmuch as a remedy is given by the act of Congress, such remedy being a sale of the stock itself.¹

The double liability of stockholders in national banks is fixed by an order of the comptroller of the currency; and under the national bank act the comptroller of the currency has absolute authority to direct at what time, and to what extent, the stockholders' statutory liability shall be enforced.² The receiver of a national bank is the proper person to enforce this liability of the stockholders.³ The defenses to this liability are substantially the same as in other cases of statutory liability.⁴

¹ *Hulitt v. Bell*, 85 Fed. Rep. 89 (1898).

² *King v. Armstrong*, 50 Ohio St. 222 (1893). The comptroller in assessing national bank stock need not have any previous judicial ascertainment of the necessity therefor. *Bushnell v. Leland*, 164 U. S. 684 (1897). It is for him to determine whether, and to what extent, the statutory liability of the stockholders shall be enforced. *Casey v. Galli*, 94 U. S. 673 (1876); *Kennedy v. Gibson*, 8 Wall. 498 (1869); *Strong v. Southworth*, 8 Ben. 331 (1875); *National Bank v. Case*, 99 U. S. 628 (1878). A voluntary assessment of the stockholders by themselves does not affect or decrease this statutory liability. *Delano v. Butler*, 118 U. S. 634 (1886). It is no defense to an assessment levied by the comptroller on a stockholder in a national bank that the full amount of the assessment will probably not be required to pay the debts. *O'Connor v. Witherby*, 111 Cal. 523 (1896).

³ The United States district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. *Stephens v. Bernays*, 44 Fed. Rep. 643 (1890). The personal liability of officers in national banks cannot be enforced by creditors after a receiver has gone in. The receiver may enforce it. *Bailey v. Mosher*, 63 Fed. Rep. 488 (1894). As to the allegations

to support a receiver's action to enforce the statutory liability in national banks, see *Nead v. Wall*, 70 Fed. Rep. 806 (1895). The federal courts have jurisdiction of a suit brought against a receiver of a national bank to compel him to recognize a depositor's claim, even though both parties are citizens of the same state. *Bartley v. Hayden*, 74 Fed. Rep. 913 (1896). A receiver of a national bank may enforce the statutory liability of stockholders. *King v. Armstrong*, 50 Ohio St. 222 (1893). The receiver of a national bank may sue a stockholder in the state courts to recover an assessment. *Peters v. Foster*, 56 Hun, 607 (1890). The United States circuit court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. *Thompson v. Pool*, 70 Fed. Rep. 725 (1895). The statutory liability of stockholders in a national bank may be enforced by an action at law, and the assessment as made by the comptroller is conclusive. *Young v. Wempe*, 46 Fed. Rep. 354 (1891).

⁴ A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made and was fraudulently made, in that the directors issued it to themselves without paying therefor. *Latimer v. Bard*, 76 Fed. Rep. 536 (1896). The state statute of limitations runs

§ 219. *Judgment and execution must be obtained against the corporation before the stockholder's statutory liability can be enforced.*—Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets.¹ This rule arises from the fact

against the stockholder's liability in a national bank from the day when the assessment levied by the comptroller becomes payable, and this statute is a bar both at law and in equity. *Thompson v. German Ins. Co.*, 76 Fed. Rep. 892 (1896). A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent. *Wingate v. Orchard*, 75 Fed. Rep. 241 (1896). Where a depositor is also a stockholder in an insolvent national bank, his claim as a depositor may be set off by the receiver of the bank to the extent of the statutory liability on the stock. This set-off may be made, although the party has assigned his right to the deposit before an assessment had been levied upon upon the stock, the assignment having been after the insolvency of the bank. *King v. Armstrong*, 50 Ohio St. 222 (1893).

¹ Quoted and approved in *Ewing v. Stultz*, 9 Ind. App. 1 (1894); *Means's Appeal*, 85 Pa. St. 75 (1877); *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747 (1887); *Allen v. Arnold*, 18 R. I. 809 (1895); *Globe Pub. Co. v. State Bank*, 41 Neb. 175 (1894); *Com'l Nat. Bank v. Gibson*, 37 Neb. 750 (1893); *Bayliss v. Swift*, 40 Iowa, 648 (1875); *McClaren v. Franciscus*, 43 Mo. 452 (1869); *Wright v. McCormack*, 17 Ohio St. 86 (1866); *Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871); *Lane v. Harris*, 16 Ga. 217 (1854); *Drinkwater v. Portland Marine R'y*, 18 Me. 35

(1841); *Dauchy v. Brown*, 24 Vt. 197 (1852); *Wilson v. Book*, 13 Wash. 676 (1896); *Cambridge Water-works v. Somerville Dyeing Co.*, 86 Mass. 239 (1862); *Toucey v. Bowen*, 1 Biss. 81 (1855); S. C., 24 Fed. Cas. 70. Cf. *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117 (1861); *Harper v. Union Mfg. Co.*, 100 Ill. 225 (1881); *Hatch v. Burroughs*, 1 Woods, 439 (1870); S. C., 11 Fed. Cas. 795. In Colorado stockholders liable by statute may be joined as parties defendant in the original suit against the corporation. *Tabor v. Goss, etc. Co.*, 11 Colo. 419 (1888). The statutory liability of directors for debts contracted in excess of a certain amount is secondary and can be enforced only after execution returned unsatisfied against the corporation. *Auburn Nat. Bank v. Dillingham*, 147 N. Y. 603 (1895). A judgment of a justice of the peace is sufficient. *Voight v. Dregge*, 97 Mich. 322 (1893). Judgment against the corporation is first necessary. Where some of the creditors are proceeding against the stockholders without first obtaining judgment against the corporation, but one creditor has procured a judgment and exhausted his remedy against the corporation, the latter may enjoin the other creditors from pursuing their remedy. *Hoyt v. Bunker*, 50 Kan. 574 (1893). If no judgment has been obtained, the stockholders can set up such defenses as would have been available to the company. *Railroad Co. v. Smith*, 48 Ohio St. 219 (1891). In an action by a judgment creditor to enforce a

that the liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource. Accordingly, the statutory liability of the stockholders is not to be resorted to, if the assets of the corporation, including the unpaid subscriptions for stock, will suffice to pay the debts.¹

Frequently the statutes which impose this extraordinary or *extra* common-law liability upon shareholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied thereunder shall have been returned wholly or partially unsatisfied, before the creditor has a right

statutory liability, claims by himself and others not yet reduced to judgment may be proved. *Thacher v. King*, 156 Mass. 490 (1892).

¹ *Stewart v. Lay*, 45 Iowa, 604 (1877); *Wright v. McCormack*, 17 Ohio St. 86 (1866). There is, however, a line of authorities in support of the proposition that a judgment against the corporation is not a prerequisite to the enforcement of the shareholders' statutory liability. *Perkins v. Church*, 31 Barb. 84 (1859); *Southmayd v. Russ*, 3 Conn. 52 (1819); *Culver v. Third Nat. Bank*, 64 Ill. 528 (1871); *Davidson v. Rankin*, 34 Cal. 503 (1868); *Young v. Rosenbaum*, 39 Cal. 646 (1870); *Morrow v. Superior Court*, 64 Cal. 383 (1883); *Bird v. Calvert*, 22 S. C. 292 (1884). No prior judgment against a corporation is necessary to enforce the liability of directors in Illinois for debts in excess of the capital stock. *Wolverton v. George, etc. Co.*, 157 Ill. 485 (1895). No prior judgment or execution is necessary in a suit against a stockholder in a California corporation. *Aldrich v. Anchor, etc. Co.*, 24 Oreg. 32 (1893). No previous judgment against the corporation is necessary in enforcing directors' statutory liability in Minnesota. *Patterson v. Stewart*, 41 Minn. 84 (1889). In Alabama the remedy against the corporation need not be first exhausted unless the statutes expressly require

it. *McDonnell v. Alabama, etc. Ins. Co.*, 85 Ala. 401 (1888). Cf. § 200, *supra*. In these cases it is held in general that the shareholder's liability under the statute is unconditional, original, and immediate, not dependent on the insufficiency of the corporate assets, and not collateral to that of the corporation upon the event of its insolvency. Thus, in *Manufacturing Co. v. Bradley*, 105 U. S. 175 (1881), it was held that, upon a bill being filed against the corporation for the collection of a debt, the shareholders might properly be made parties in order to avoid a multiplicity of suits, and upon the ground that the shareholders were immediately liable under that provision of their charter which made members of the company "jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company" is paid in. Under the New York act of 1875 a stockholder could be sued before judgment against the corporation, but could not be held liable until after such judgment. *Walton v. Coe*, 110 N. Y. 109 (1888). Under the Wisconsin statute it is unnecessary to exhaust the assets of the corporation if it is clear that the statutory liability must be resorted to. *Booth v. Dear*, 71 N. W. Rep. 816 (Wis., 1897).

to proceed against the stockholders individually.¹ Where, however, the proceedings against the corporation would be nugatory or impossible, they need not be had.²

Where the statutes provide for an enforcement of the share-

¹ *Handy v. Draper*, 89 N. Y. 334 (1882). But a contrary rule prevailed under the Business Corporation Act of 1875. See *Walton v. Coe*, 110 N. Y. 109 (1888). See also *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338 (1882); *Dean v. Mace*, 19 Hun, 391 (1879). The statutory liability of directors in Michigan for failure to file their report may be enforced by one suit against all of them, and no prior judgment against the creditors is necessary if the failure to file the report was wilful. *Wilcox C. & S. Co. v. Mosher*, 72 N. W. Rep. 117 (Mich., 1897). Sometimes the statute provides that a specific demand shall have been made. *Haynes v. Brown*, 36 N. H. 545 (1858); *Hicks v. Burns*, 38 N. H. 141 (1839). In Wisconsin, by statute, there need be no precedent judgment against the corporation. *Sleeper v. Goodwin*, 67 Wis. 577 (1887). The case of *Patterson v. Lynde*, 112 Ill. 196 (1884), holds that the judgment must be obtained in the state where enforcement is sought, and that not even a judgment in the federal circuit court for that district will suffice. Cf. § 200, *supra*.

² See § 200, *supra*. Cf. *Shellington v. Howland*, 53 N. Y. 371 (1873), where proceedings required as conditions precedent to liability were rendered impossible by the operation of United States bankruptcy law. See also *State Sav. Assoc. v. Kellogg*, 52 Mo. 583 (1873); *Dryden v. Kellogg*, 2 Mo. App. 87 (1876). Cf. *Ansonia Brass, etc. Co. v. New Lamp, etc. Co.*, 53 N. Y. 123 (1873); S. C., *aff'd*, 91 U. S. 656 (1875); *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747 (1887); *Paine v. Stewart*, 33 Conn. 516 (1866), where, under a statute providing that the property of

stockholders could not be levied upon while corporate property could be found to satisfy the debt, it was held that evidence that the corporate property was in the hands of a receiver was sufficient to prove the condition; *Chamberlain v. Huguenot Mfg. Co.*, 118 Mass. 532 (1875), holding that proceedings in bankruptcy do not, in Massachusetts, prevent recovering judgment against the bankrupt corporation for the purpose of perfecting the liability of stockholders. Where, by reason of an injunction or other cause, it is impossible to obtain judgment against the corporation, it may be excused. *Hunting v. Blun*, 143 N. Y. 511 (1894). Even where the statute requires it, a suit to enforce a statutory liability need not be delayed until the corporate property has all been applied to the payment of debts. if it be clear that such property will be insufficient to pay everything. *Munger v. Jacobson*, 99 Ill. 349 (1881). Or where the corporation is clearly insolvent, and it would be idle to wait the return of the execution. *Flash v. Conn*, 109 U. S. 371 (1883); *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875). No judgment and execution are necessary if the company has assigned for the benefit of creditors. *Minneapolis, etc. Co. v. Swinburne Co.*, 69 N. W. Rep. 144 (Minn., 1896). Cf. *Toucey v. Bowen*, 1 Biss. 81 (1855); S. C., 24 Fed. Cas. 70; *Munger v. Jacobson*, 99 Ill. 349 (1881). Or the corporation is dissolved. *Patterson v. Lynde*, 112 Ill. 196 (1884). A judgment against the corporation is not necessary to enforce the stockholder's liability when the corporation is insolvent, has ceased to do business, and has made

holder's statutory liability only upon the dissolution of the corporation, it is held that a dissolution, in the sense in which that term is here used, takes place when the corporation comes into the condition of having debts and no assets, or has ceased to act and exercise its corporate functions, or has suffered acts to be done which end the object for which it was created.¹ But an injunction against bringing suits against a corporation is no excuse where no effort is made to modify such injunction.²

A judgment must be obtained and execution issued and returned in the state where suit is brought, or good reason must be shown why they are not.³

§ 220. *Difficulties in determining whether the creditor's remedy is at law or in equity—Special remedies.*—Perhaps the most difficult, unsettled, and unsatisfactory question concerning the statutory liability of stockholders is the question whether that liability must be enforced at law or must be in equity, or may be in either a court of law or of equity. After determin-

an assignment for the benefit of creditors. *Morgan v. Lewis*, 46 Ohio St. 1 (1888). Judgment against the corporation need not first be obtained if the corporation has been dissolved. *Hardman v. Sage*, 124 N. Y. 25 (1891). The issue and return of an execution unsatisfied against the corporation is necessary where the corporation is a going concern, but not where it is insolvent and has assigned for the benefit of its creditors. *Barrick v. Gifford*, 47 Ohio St. 180 (1890). See also next note.

¹ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840); *Slee v. Bloom*, 19 Johns. 456 (1822); *Penniman v. Briggs*, 1 Hopk. Ch. 300 (1824); *S. C. sub nom. Briggs v. Penniman*, 8 Cow. 387 (1826); *State Sav. Assoc. v. Kellogg*, 52 Mo. 583 (1873); *Dryden v. Kellogg*, 2 Mo. App. 87 (1876); *Perry v. Turner*, 55 Mo. 418 (1874); *Central Agric. etc. Assoc. v. Alabama, etc. Ins. Co.*, 70 Ala. 120 (1881); *McDonnell v. Alabama, etc. Ins. Co.*, 85 Ala. 401 (1888). Cf. *Morley v. Thayer*, 3 Fed. Rep. 737 (1880), hold-

ing that bankruptcy of the corporation is not a dissolution of a corporation within the meaning of the statute of Massachusetts imposing liability upon stockholders. A judgment and execution are first necessary unless the corporation is dissolved or has ceased business for more than a year. *Merrill v. Meade*, 49 Pac. Rep. 787 (Kan., 1897). In Florida upon dissolution the stockholders are liable "to an extent equal in amount to the amount of stock by him owned, together with any amount unpaid thereon." The dissolution need not be by judicial decree to that effect. It is sufficient if there are debts and no assets, and the corporation has ceased to act and exercise its corporate functions, or has suffered acts to be done which end the object for which it was created. Suit against the corporation first is not necessary in such a case. *Gibbs v. Davis*, 27 Fla. 531 (1891). See preceding note. 53 Pac. Rep. 757.

² *United, etc. Co. v. Vary*, 152 N. Y. 121 (1897).

³ See § 223, *infra*.

ing this point there arises the further difficulty of ascertaining who shall be parties plaintiff and parties defendant — whether one corporate creditor may sue, or all must join; whether one stockholder may be pursued as a single defendant, or all the stockholders must be brought in. The law on these points is in a transition stage. The question is largely one of practice, and from experience the courts will doubtless evolve that rule which is most just and convenient. At present, however, not only must the decisions of the state in which the action is brought be examined, but it is necessary also to note carefully the wording of the statute creating the liability. Where the statute prescribes expressly the form of the remedy, it is the well-established rule that that remedy was intended by the legislature to exclude every other, and it must be strictly pursued.¹ The Ohio statutory liability may be enforced in proceedings to wind up and distribute the assets of the corporation.² By the mode of procedure in Kansas a stockholder may be brought into the original suit.³ But the Kansas statute authorizing a levy of execution upon the property of stockholders without a regular suit against such stockholders does not prevent the creditor proceeding by suit instead of resorting to the execution first.⁴ In other words,

¹ *Lowry v. Inman*, 46 N. Y. 119, 127 (1871); *Morley v. Thayer*, 3 Fed. Rep. 737, 741 (1880); *Haskins v. Harding*, 2 Dill. 99 (1873); S. C., 11 Fed. Cas. 778; *Allen v. Walsh*, 25 Minn. 543 (1879); *Windham, etc. Inst. v. Sprague*, 43 Vt. 502 (1871); *Dauchy v. Brown*, 24 Vt. 197 (1852); *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313 (1875); *Pollard v. Bailey*, 20 Wall. 520 (1874); *Knowlton v. Ackley*, 62 Mass. 93, 98 (1851); *Erickson v. Nesmith*, 81 Mass. 221 (1860); *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43 (1864); *Hoard v. Wilcox*, 47 Pa. St. 51 (1864); *Youghio-gheny Shaft Co. v. Evans*, 72 Pa. St. 331 (1872). Cf. *Andrews v. Callender*, 30 Mass. 484 (1833); *Potter v. Stevens Machine Co.*, 127 Mass. 592 (1879); *Grose v. Hilt*, 36 Me. 22 (1853); *Diven v. Lee*, 36 N. Y. 302 (1867); *Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871).

² *Peter v. Farrel, etc. Co.*, 53 Ohio St. 534 (1895).

³ *Buist v. Citizens' Sav. Bank*, 4 Kan. App. 700 (1896). The summary method of enforcing the statutory liability under the Kansas statutes is not good as against an estate being wound up in the proper court. *Achenbach v. Pomeroy Coal Co.*, 2 Kan. 357 (1895). As to the character of the notice to be served on the stockholder before execution is issued against him under the Kansas statute, see *McClelland v. Cragun*, 54 Kan. 599 (1895). The summary method in Kansas is not available until the remedy against the corporation has been exhausted. *Carey Lumber Co. v. Neal*, 3 Kan. App. 399 (1895).

⁴ *Bank of North America v. Rindge*, 57 Fed. Rep. 279 (1893).

although collection may be by notice in the original suit against the corporation, yet this does not prevent an independent suit.¹

The subject of statutes authorizing a judgment creditor of the corporation, after execution returned unsatisfied, to issue execution against any stockholder without being obliged to institute a new action, is considered elsewhere.²

Another remedy still is to allow the plaintiff creditor to join stockholders as defendants in his original suit against the corporation.³ A remedy by motion exists in Florida.⁴ These special remedies may operate to prevent the enforcement of the liability in the courts of other states.⁵

§ 221. *The remedy at law.*—In New York the shareholder's liability, imposed by the statute relative to miscellaneous corporations, was held to be such that any creditor who had recovered a judgment against the company, and sued out an execution thereon, which had been returned unsatisfied, might sue any stockholder and recover to the extent provided by the statute in an action at law.⁶ A similar conclusion was reached in Illinois,⁷

¹ *McVickar v. Jones*, 70 Fed. Rep. 754 (1895).

² See § 201, *supra*.

³ *Milroy v. Spurr Mountain, etc. Co.*, 43 Mich. 231 (1880), holding that, if the statute authorizes a suit against the corporation alone or jointly with one or more stockholders, a creditor who elects to sue it alone cannot afterwards proceed upon the same debt against the corporation and stockholders jointly. One of the creditors who is a party to the sequestration proceedings may in those proceedings enforce the stockholder's statutory liability. *McKusick v. Seymour, etc. Co.*, 48 Minn. 158 (1892).

⁴ *Hood v. French*, 37 Fla. 117 (1896).

⁵ See § 223, *infra*.

⁶ *Abbott v. Aspinwall*, 26 Barb. 202 (1857); *Wiles v. Suydam*, 64 N. Y. 173 (1876); *Shellington v. Howland*, 53 N. Y. 371 (1873); *Handy v. Draper*, 89 N. Y. 334 (1882); *Rocky Mountain Nat. Bank v. Bliss*, 89 N. Y. 338 (1882); *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Flash v. Conn*, 109 U. S. 371, 380 (1883);

Weeks v. Love, 50 N. Y. 568 (1872); *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840). *Cf.* *Van Hook v. Whitlock*, 3 Paige, 409 (1832); *Simonson v. Spencer*, 15 Wend. 548 (1836); *Walton v. Coe*, 110 N. Y. 109 (1888). But when the action is to enforce the statutory liability to employees, "laborers, servants, and apprentices," in New York, it has been held that all the shareholders should be made parties. *Strong v. Wheaton*, 38 Barb. 616 (1861). The creditor must sue one or all. *Dean v. Whiton*, 16 Hun, 203 (1878).

⁷ In Illinois, under the charter provision that "each stockholder shall be liable to double the amount of stock" owned, it was held that the stockholders were severally and individually liable; that is, that an action at law against one or all of them would lie. *McCarthy v. Lavasche*, 89 Ill. 270 (1873); *Hull v. Burtis*, 90 Ill. 213 (1878); *Fuller v. Ledden*, 87 Ill. 310 (1877).

Pennsylvania,¹ Massachusetts, and Georgia.² So also when it is provided by statute that the shareholders "shall, to the amount of the stock by them held be jointly and severally liable for all the debts and responsibilities of such company," it is held that an action at law may be maintained on the individual liability by any corporate creditor against any individual shareholder.³

Where an action at law can be maintained, and the shareholder's liability is limited and several, each shareholder being made liable for a sum certain, a separate action will lie against each one.⁴ And unless the remedy at law has been enlarged by statute, so as to allow judgment separately against each

¹ In Pennsylvania, under the statute relating to the incorporation of manufacturing companies, the corporate creditor proceeds against the shareholders in an action at law upon the original contract, making the corporation and all the shareholders parties defendant. *Brinham v. Wellersburg Coal Co.*, 47 Pa. St. 43 (1864); *Mansfield Iron Works v. Willcox*, 52 Pa. St. 377 (1866); *Hoard v. Wilcox*, 47 Pa. St. 51 (1864); *McHose v. Wheeler*, 45 Pa. St. 32 (1863). See *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117 (1861). And to same effect, *Thompson v. Jewell*, 43 Mich. 240 (1880).

² *Pope v. Leonard*, 115 Mass. 286 (1874). Under a Georgia statute, by the provisions of which each shareholder in banking corporations in that state is made liable to redeem his proportionate share of the outstanding circulation, a single creditor may have his action at law against any individual shareholder. *Lane v. Harris*, 16 Ga. 217 (1854); *Lane v. Morris*, 8 Ga. 468 (1850); *Branch v. Baker*, 53 Ga. 502 (1874); *Hatch v. Burroughs*, 1 Woods, 439 (1870); S. C., 11 Fed. Cas. 795. Cf. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840).

³ *Grund v. Tucker*, 5 Kan. 70 (1869); *Norris v. Johnson*, 34 Md. 485 (1871). See *Bullard v. Bell*, 1 Mason, 243 (1817), by Story, J.; S. C., 4 Fed. Cas.

625. Cf. *Matthews v. Albert*, 24 Md. 527 (1866); *Culver v. Third Nat. Bank*, 64 Ill. 528 (1871); *Bond v. Appleton*, 8 Mass. 472 (1812). The Missouri statute may be enforced at law. *Savings Assoc. v. O'Brien*, 51 Hun, 45 (1889). By statute in California the remedy may be at law. *Borland v. Haven*, 37 Fed. Rep. 394 (1888). The double liability of stockholders in a Colorado corporation can be enforced at law only. *Auer v. Lombard*, 72 Fed. Rep. 209 (1896). In *Whitman v. National Bank*, 83 Fed. Rep. 288 (1897), a Pennsylvania bank, as a judgment creditor of a Kansas corporation, enforced in the United States court in New York the statutory liability of a New York stockholder in such Kansas corporation. The action was at law.

⁴ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840); *Perry v. Turner*, 55 Mo. 418 (1874); *Boyd v. Hall*, 56 Ga. 563 (1876), where the liability was *pro rata*; *Paine v. Stewart*, 33 Conn. 516 (1866); *Culver v. Third Nat. Bank*, 64 Ill. 528 (1871); *Abbott v. Aspinwall*, 26 Barb. 202 (1837); *Garrison v. Howe*, 17 N. Y. 458 (1858); *Terry v. Little*, 101 U. S. 216 (1879). In the action at law, other stockholders need not be joined, under the Kansas decisions. *McVickar v. Jones*, 70 Fed. Rep. 754 (1895).

one of several defendants before the court in the same proceeding, each creditor must sue each shareholder, or each creditor must sue some one or more shareholders separately.¹

§ 222. *The remedy in a court of equity.*—The remedy in equity is the favorite remedy of the courts. It is just, certain, impartial, and clear. It enforces once for all the liability of the stockholders, and at the same time provides for contribu-

¹ *Abbott v. Aspinwall*, 26 Barb. 202 (1857); *Paine v. Stewart*, 33 Conn. 516 (1866); *Re Hollister Bank*, 27 N. Y. 393 (1863); *Perry v. Turner*, 55 Mo. 418 (1874); *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840). *Cf. Milroy v. Spurr Mountain, etc. Co.*, 43 Mich. 231 (1880). Where the shareholder's liability is held to be like that of a partner, then all must be joined as defendants, and the omission of any one is ground for a plea in abatement. *Allen v. Sewall*, 2 Wend. 327 (1829), but holding that it cannot be taken advantage of on the trial; *Strong v. Wheaton*, 38 Barb. 616 (1861), holding that, under the New York code, defect of parties herein must be objected to by demurrer or answer; *Reynolds v. Feliciano Steamboat Co.*, 17 La. Rep. 397 (1841); *Dean v. Whiton*, 16 Hun, 203 (1878); *Bonewitz v. Van Wirt County Bank*, 41 Ohio St. 78 (1884), holding that the sheriff's return showing clearly that other stockholders are out of the jurisdiction must be in proof. *Cf. Dodge v. Minnesota, etc. Co.*, 16 Minn. 368 (1871); *Culver v. Third Nat. Bank*, 64 Ill. 528 (1871); *Branson v. Oregonian R'y*, 10 Oreg. 278 (1882); *Hoag v. Lamont*, 60 N. Y. 96 (1875); *Abbott v. Aspinwall*, 26 Barb. 202, 207 (1857). As to the joinder of parties in Pennsylvania, see *Mansfield Iron Works v. Willcox*, 52 Pa. St. 377 (1866); *McHose v. Wheeler*, 45 Pa. St. 32 (1863); *Hoard v. Wilcox*, 47 Pa. St. 51 (1864). A creditor suing directors on a statutory liability need not join all creditors nor all directors.

Patterson v. Stewart, 41 Minn. 84 (1889). The corporation need not be joined as a party defendant. The suit may be against the estate of a deceased stockholder. It may be a separate suit from that against the corporation. *Nolan v. Hazen*, 44 Minn. 478 (1890). In Pennsylvania the corporation also should be made a party defendant. *Hoard v. Wilcox*, 47 Pa. St. 51 (1864); *Mansfield Iron Works v. Willcox*, 52 Pa. St. 377 (1866). *Cf. Deming v. Bull*, 10 Conn. 409 (1835); *Middletown Bank v. Magill*, 5 Conn. 28 (1823). In Vermont a provision that shareholders "shall be personally holden" is held to create only a joint liability. *Windham Prov. Inst. v. Sprague*, 43 Vt. 502 (1871). The suit may be at law and by one creditor against one stockholder. The corporation need not be joined. *Gibbs v. Davis*, 27 Fla. 531 (1891). The liability of stockholders under the Kansas statute is several and not joint. The creditors cannot join several stockholders in one suit. Each must be sued separately. *Abbey v. Grimes, etc. Co.*, 44 Kan. 415 (1890). In Minnesota a single creditor cannot sue a single stockholder. Hence such a claim cannot be enforced in the probate court. *Re Martin's Estate*, 56 Minn. 420 (1894). Under the Montana statute rendering directors liable for not filing a report, any creditor may sue any director at law, and the right of action may be assigned. *Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695 (1896).

tion. It distributes the assets equally and equitably among all the corporate creditors. It prevents a multiplicity of suits, and avoids the difficult question as to whether a suit at law will lie. The only and great objection to the remedy in equity is that it is protracted, vexatious, and expensive.¹

Frequently the courts have held that an action at law to enforce a statutory liability is not a proper proceeding, but that the rights of all parties can be properly adjusted only in a court of equity, and that the latter remedy is exclusive of all others.² Such are the latest decisions in New York.

¹Thus, with reason, the court said, in *Mason v. Alexander*, 44 Ohio St. 818 (1886): "By reason of the great number of stockholders, the frequent transfers of stock, the decease of parties, and of other causes, delays—vexatious, expensive, and almost interminable—seem to be inevitable in all such proceedings; so much so, indeed, that such liability has grown to be looked upon as furnishing next to no security at all for the debts of corporations."

²A suit in equity is the exclusive remedy to enforce the usual double liability of stockholders for corporate debts. *Marshall v. Sherman*, 148 N. Y. 9 (1895). The statutory liability of directors for debts over a certain amount can be enforced only in equity. *Auburn Nat. Bank v. Dillingham*, 147 N. Y. 603 (1895). The liability of stockholders in banks in Nebraska can be enforced only by one creditor or a receiver suing in equity in behalf of all. *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353 (1896). The remedy must be in equity. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896). As to the form of the plea that the remedy is in equity, see *Glens Falls Nat. Bank v. Cramton*, 72 Fed. Rep. 734 (1896). A suit to enforce the statutory liability of directors in an Illinois corporation for any excess of the debts over the capital stock may be in equity, inasmuch as

an accounting must be had, and the corporation is a necessary party defendant. Such a suit cannot be brought in Wisconsin, where the corporation cannot be brought in. *James, etc. Co. v. Libbey*, 85 Fed. Rep. 821 (1898). Thus, under a charter provision that stockholders shall "be bound respectively for all the debts of the bank in proportion to their stock holden therein," it was held that an action at law by a single creditor against a single stockholder would not lie. *Pollard v. Bailey*, 20 Wall. 520 (1874); *Hatch v. Dana*, 101 U. S. 205 (1879); *Terry v. Little*, 101 U. S. 216 (1879); *Smith v. Huckabee*, 53 Ala. 191 (1875); *Jones v. Jarman*, 34 Ark. 323 (1879). Cf. *Wright v. McCormack*, 17 Ohio St. 86 (1866); *Sands v. Kimbark*, 39 Barb. 108, 120 (1863); *Cushman v. Shepard*, 4 Barb. 113 (1848). Nor under a statute making the stockholders of a banking company "individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind." *Sleeper v. Goodwin*, 67 Wis. 577 (1887); *Carpenter v. Marine Bank*, 14 Wis. 705, n. (1862). Another ground is that at law the indebtedness of the corporation and the several liabilities of the members could not be equitably adjusted. *Low v. Buchanan*, 94 Ill. 76 (1879), where the directors were held liable for an excess of in-

In some jurisdictions the rule prevails that creditors in these cases have a concurrent remedy, either at law or in equity. The action at law will lie upon the debt, while, on the other hand, the equitable jurisdiction arises from the power of a court of chancery to compel contribution among the shareholders and to effect an equitable distribution among the creditors.¹ The

debtedness; *Queenan v. Palmer*, 117 Ill. 619 (1886); *Stewart v. Lay*, 45 Iowa, 604 (1877); *Garrison v. Howe*, 17 N. Y. 458 (1858); *Story v. Furman*, 25 N. Y. 214 (1862). *Cf.* *Flash v. Conn*, 109 U. S. 371 (1883).

Where, in South Carolina, the charter of a bank provided that upon the failure of the bank "each stockholder shall be liable and held bound . . . for any sum not exceeding twice the amount of . . . his . . . shares," it was held by the supreme court of the United States that a suit in equity by or on behalf of all the creditors is the only appropriate mode of enforcing the liability incurred by such a failure. *Terry v. Little*, 101 U. S. 216 (1879); *Harris v. First Parish*, 40 Mass. 112 (1839); *Coleman v. White*, 14 Wis. 700 (1862); *Ladd v. Cartwright*, 7 Oreg. 329 (1879); *Smith v. Huckabee*, 53 Ala. 191 (1875). See *Patterson v. Lynde*, 106 U. S. 519 (1882). In Illinois there was some doubt as to whether the bill in equity would lie, but the case of *Tunesma v. Schuttler*, 114 Ill. 156 (1885), holds that, in case the corporation is insolvent and the corporate creditors numerous, a bill in equity is the proper remedy. Under the Manufacturing Company's Act of Illinois, the creditor's remedy is held to be clearly in equity. *Rounds v. McCormick*, 114 Ill. 252 (1885); *Harper v. Union Mfg. Co.*, 100 Ill. 225 (1881); *Low v. Buchanan*, 94 Ill. 76 (1879). See *Pierce v. Milwaukee Constr. Co.*, 38 Wis. 253 (1875), for the rule in that state. Where under a creditor's bill a receiver is appointed and the assets

administered, and then by a supplemental bill the stockholder's liability enforced, a creditor who received a dividend under the original bill cannot sue a stockholder at law. *Tunesma v. Schuttler*, 114 Ill. 156 (1885). The remedy is in equity alone, and non-joinder of any stockholders as defendants will render the bill demurrable. *Friend v. Powers*, 93 Ala. 114 (1891).

¹ *Bank of United States v. Dallam*, 4 Dana (Ky.), 574 (1836); *Van Hook v. Whitlock*, 3 Paige, 409 (1832); *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840); *Masters v. Rossie Lead Min. Co.*, 2 Sandf. Ch. 301 (1845); *Pfohl v. Simpson*, 74 N. Y. 137 (1878); *Eames v. Doris*, 102 Ill. 350 (1882); *Culver v. Third Nat. Bank*, 64 Ill. 528 (1871); *Perry v. Turner*, 55 Mo. 418 (1874); *Norris v. Johnson*, 34 Md. 485, 489 (1871); *Matthews v. Albert*, 24 Md. 527 (1866). *Cf.* *Weeks v. Love*, 50 N. Y. 568 (1872); *Garrison v. Howe*, 17 N. Y. 458 (1858). And see the following New York cases, wherein it is held that a remedy in equity is preferable: *Morgan v. New York, etc. R. R.*, 10 Paige, 290 (1843); *Sherwood v. Buffalo, etc. R. R.*, 12 How. Pr. 136 (1855); *Hinds v. Canandaigua, etc. R. R.*, 10 How. Pr. 487 (1855); *Courtois v. Harrison*, 12 How. Pr. 359 (1856)—the last three cases relating to supplementary proceedings. The Kansas liability may be enforced by a bill in equity to reach both the statutory and subscription liability. *New, etc. Co. v. Beard*, 80 Fed. Rep. 66 (1897).

tendency is to hold that a suit in equity is always a proper remedy, even though it may not be the exclusive remedy.¹

In the courts of the United States it is the rule that, where a stockholder's statutory liability is by the terms of the statute a joint and several or several liability, the creditor may, after the remedy against the corporation has been exhausted, enforce his rights in an action at law; but, in all other cases of statutory liability, the remedy must be in equity, as in cases of unpaid subscriptions.² The corporation and all solvent stockholders

¹ A bill in equity by one creditor in behalf of himself and all others and against all stockholders is proper. *Harper v. Carroll*, 62 Minn. 152 (1895). Where by statute directors are liable for debts in excess of the capital stock, a part of the creditors cannot enforce the liability for their claims alone. *Moulton v. Connell, etc. Co.*, 93 Tenn. 377 (1894). A liability by statute of directors for a specified amount of the debts of the company may be enforced by a creditor suing in equity in behalf of himself and others, and all of the directors may be joined as parties defendant. The corporation is not a necessary party defendant, and the other creditors are not necessary parties plaintiff. *Bauer v. Platt*, 72 Hun, 326 (1893). The corporation is not a necessary party defendant. *Third Nat. Bank v. Angell*, 18 R. I. 1 (1894). All the stockholders need not be joined, but those who are joined may bring in the others by a cross-bill. *Palmer v. Woods*, 149 Ill. 146 (1894).

² *Pollard v. Bailey*, 20 Wall. 520 (1874); *Terry v. Little*, 101 U. S. 216 (1879). Cf. *Terry v. Tubman*, 92 U. S. 156 (1875); *Andrews v. Bacon*, 38 Fed. Rep. 777 (1889); *Cuykendall v. Miles*, 10 Fed. Rep. 342 (1882), where the court said: "The supreme court hold that the mode in which a liability of this sort is to be enforced depends entirely upon the particular law governing the corporation. If that law merely provides for a proportionate

liability of all stockholders for all debts, there should be a bill in equity for the benefit of all the creditors and against all the stockholders. (Citing cases.) But if the law of the state authorizes an action by one creditor against one stockholder, that remedy may be pursued." *Patterson v. Lynde*, 106 U. S. 519 (1882). As to joinder of parties, see U. S. Rev. Stat., § 737. The liability of subscribers for stock under the Maine statutes, where the stock is not properly paid up, cannot be enforced in the federal courts by a suit in equity, even though the statutes of Maine authorize such a suit. *Alderson v. Dole*, 74 Fed. Rep. 29 (1896). An action at law lies in the federal courts, when that remedy is appropriate. *Bullard v. Bell*, 1 Mason, 243 (1817); S. C., 4 Fed. Cas. 625. Or where the courts of the state creating the liability hold that an action at law will lie. *Mills v. Scott*, 99 U. S. 25 (1878); *National Park Bank v. Peavey*, 64 Fed. Rep. 912 (1894). In the federal courts a suit to enforce a director's statutory liability is in equity. *Stone v. Chisolm*, 113 U. S. 302 (1884). The liability of stockholders under the Ohio laws is several and to all creditors. *Newberry v. Robinson*, 41 Fed. Rep. 458 (1890). When the equitable remedy is pursued, the corporation and all the solvent shareholders within the jurisdiction who are known must be made defendants. Contribution among the shareholders

in the jurisdiction should be joined as defendants.¹ A stockholder sued at law may institute an equitable proceeding to bring in all the parties.² Where many suits have been brought to enforce the statutory liability, the court may enjoin all of the suits excepting one, that one being for the benefit of all, and being in equity.³ A corporate creditor's suit in equity in behalf of himself and all others to enforce the stockholders'

ers is of the essence of the proceeding, and that is best effected when all are made parties. *Walsh v. Memphis, etc. R. R.*, 2 McCrary, 156 (1881); S. C., 6 Fed. Rep. 797.

¹All the stockholders should be made parties, but the defect may be waived. *Arthur v. Willius*, 44 Minn. 409 (1890); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Hadley v. Russell*, 40 N. H. 109 (1860). The joinder of all the shareholders may be dispensed with in a case where it is shown to be impracticable. *Umsted v. Buskirk*, 17 Ohio St. 113 (1866); *Pettibone v. McGraw*, 6 Mich. 441 (1859); *Pierce v. Milwaukee Constr. Co.*, 38 Wis. 253 (1875); *Coleman v. White*, 14 Wis. 700 (1862); *Crease v. Babcock*, 51 Mass. 525 (1846); *Brundage v. Monumental, etc. Min. Co.*, 12 Oreg. 322 (1885), holding, also, that a defendant stockholder desiring to bring in other stockholders must do that by an appropriate cross-proceeding. And an action to enforce statutory liability may be joined with an action to collect unpaid subscriptions. *Warner v. Callender*, 20 Ohio St. 190 (1870). But a claim against stockholders upon a liability imposed by statute cannot be joined in one bill in equity with a penal claim against the directors of the company. *Cambridge Water-works v. Somerville Dyeing, etc. Co.*, 80 Mass. 193 (1859); *Pope v. Leonard*, 115 Mass. 286 (1874); *Mappier v. Mortimer*, 11 Abb. Pr. (N. S.) 455 (1871). Cf. *Wiles v. Suydam*, 64 N. Y. 173 (1876). The case of *Mason v. Alexander*, 44 Ohio St.

318 (1886), holds that the corporation is a necessary party to the creditor's suit in equity; that judgment against the stockholders is to be against them severally; and that interest is to be allowed from the commencement of the suit, "although the amount of recovery may thereby exceed the stockholder's original liability." In a corporate creditor's action against a few stockholders, to enforce their liability and to obtain discovery of other stockholders, the discovery may be compelled. *Hippel v. Five-Mile, etc. Co.*, 3 Atl. Rep. 682 (N. J., 1886). See also § 519, *infra*. A married woman in Arkansas may own stock and be liable thereon. Her liability may be enforced in equity. *Bundy v. Cocke*, 128 U. S. 185 (1888). Proceedings to enforce the statutory liability are made elastic, and applications of creditors who come in may cure defects in the original papers. *Arthur v. Willius*, 44 Minn. 409 (1890).

²*Pfohl v. Simpson*, 74 N. Y. 137 (1878); *Cochran v. Wiechers*, 119 N. Y. 399 (1890); *Garrison v. Howe*, 17 N. Y. 458 (1858). *Semble*, *Thebus v. Smiley*, 110 Ill. 316 (1884); *Eames v. Doris*, 102 Ill. 350 (1882).

³*Bagley, etc. Co. v. Ehrlicher*, 8 N. Y. App. Div. 581 (1896). A suit by a creditor to enforce the statutory liability of directors for debts in excess of the capital stock should be for the benefit of all creditors, and where there are several suits all will be stayed excepting one. *American Grocery Co. v. Flint*, 5 N. Y. App. Div. 263 (1896). See also § 226, *infra*.

statutory liability does not, even though it goes to a decree, prevent other creditors filing a subsequent bill for the same purpose.¹ The judgment against each stockholder is for the full amount of his liability, even though the aggregate of such judgments is more than the entire debts; but the execution should be by instalments, the first one being for a *pro rata* share of each stockholder's corporate indebtedness, and subsequent levies to make up that which cannot be collected from insolvent stockholders.² Where a creditor brings suit in behalf of himself and all other creditors to enforce the statutory liability under an agreement by which the other creditors rely on this suit as a test case, the former will not be allowed to discontinue, after the statute of limitations has run, so as to prevent other suits by other creditors.³ It is not necessary to allege the amount of stock which the defendant holds.⁴

§ 223. *Enforcement of the statutory liability in the courts of another state — Penal liabilities — Construction of liability created by another state.*—The stockholders of a corporation are generally widely scattered, and reside in many states. Accordingly, when some or all of them are non-residents of the state in which the corporation exists, the important question arises whether the courts of one state will enforce a stockholder's statutory liability created by the statutes of another state. If not, then non-resident stockholders practically escape the liability which they assumed when they became members of the corporation.

The cases are uniform in holding that the extent of the stock-

¹Palmer v. Woods, 149 Ill. 146 (1894).

²Harper v. Carroll, 69 N. W. Rep. 610 (Minn., 1896). The court in a suit in equity may cause the property of a non-resident stockholder to be attached. Harper v. Carroll, 69 N. W. Rep. 610 (Minn., 1896).

³Hirshfeld v. Bopp, 5 N. Y. App. Div. 202 (1896). As to the form of a decree in a creditor's action, and as to the right of a creditor to discontinue a suit brought in behalf of himself and other creditors, see Salisbury

v. Binghamton Pub. Co., 85 Hun, 99 (1895).

⁴Rowell v. Janvrin, 151 N. Y. 60 (1896). The complaint must definitely allege stockholdership. McVickar v. Jones, 70 Fed. Rep. 754 (1895). In a suit to enforce the statutory liability of stockholders in a California corporation, the plaintiff must set forth the amount of stock issued, the amount held by the defendant, and the amount of the debt. Roebbing's Sons Co. v. Butler, 112 Cal. 677 (1896).

holder's statutory liability and the character of that liability depend upon and are determined by the charter of the corporation or the statute of the state which created it.¹

In general, when the courts of one state are asked to enforce the statutory liability of stockholders in a corporation created by another state, two things are to be considered: First, is the statutory liability itself a contract liability or a mere penalty? Second, are the remedies provided by the laws of the state where suit is brought adequate to the just enforcement of the liability?

The answer to the first question depends on the words of the statute imposing the liability. The law is clear that the courts of one state will not enforce penalties imposed by another

¹ *Payson v. Withers*, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29; *Seymour v. Sturges*, 26 N. Y. 134 (1862); *McDonough v. Phelps*, 15 How. Pr. 372 (1856); *Ex parte Van Riper*, 20 Wend. 614 (1839); *Aultman's Appeal*, 98 Pa. St. 505 (1881). When the suit is maintainable, the construction placed upon the statute of the state in which the corporation exists, by the courts of that state, is, as a general rule, controlling, and will be followed by the courts of the state where the suit to enforce is brought. *Jessup v. Carnegie*, 80 N. Y. 441 (1880); *Chase v. Curtis*, 113 U. S. 452 (1884); *Savings Assoc. v. O'Brien*, 51 Hun, 45 (1889). *Cf. Hill v. Beach*, 12 N. J. Eq. 31 (1858); *Nabob of Carnatic v. East India Co.*, 1 Ves. Jr. 371 (1791); *Dutch West India Co. v. Van Moses*, 1 Strange, 612 (1725). In enforcing the statutory liability of stockholders in a foreign corporation, the decisions of the courts in the state where the company is incorporated will be followed. *Fowler v. Lamson*, 146 Ill. 472 (1893), holding also, however, that the remedies of the state where the company is incorporated will not be applied. This principle applies, of course, only to corpora-

tions which were legally incorporated. For the liability where the incorporation was not legal, see ch. XIII, *infra*. The United States courts take judicial notice of the statutes of the various states. *Newberry v. Robinson*, 36 Fed. Rep. 841 (1888). In *Bateman v. Service*, L. R. 6 App. Cas. 386 (1881), the ground is taken that a liability created by statute remains the same wherever the corporation may transact its business, or wherever the shareholders may happen to live, and that the fact of doing business in a foreign state does not subject the shareholders of the corporation to the operation of laws which create statutory liability in such foreign state. In accordance with this view it was held in Ohio that where a foreign corporation, without statutory liability of its stockholders, did business in Ohio, where the statutes prescribe a personal liability for stockholders in domestic corporations of similar character, the shareholders of the foreign corporation are protected by the exemption they enjoy at home. *Second Nat. Bank v. Hall*, 35 Ohio St. 158 (1878). See also §§ 12, 199, *supra*, and § 243, *infra*.

state.¹ But the usual statutory liability of stockholders is not a penalty. The courts are nearly unanimous in holding that where by statute the stockholders in a corporation, instead of being relieved entirely from liability to corporate creditors, are only partially relieved therefrom, the additional liability is a contract liability, and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability, and is generally held to be such by the courts of all the states.² The question of what constitutes a penal liability and what constitutes a contractual liability of stockholders and directors in corporations has recently been carefully considered by the supreme court of the United States,³ and by the privy council in England.⁴ A statute ren-

¹ Story, Conf. L., §§ 620, 621; Wharton, Conf. L., §§ 4, 853 *et seq.*; Rorer, Interstate L. 148, 149. See also Lowry v. Inman, 46 N. Y. 119 (1871); Patterson v. Baker, 34 How. Pr. 180 (1867); Howell v. Manglesdorf, 33 Kan. 194 (1885). Penal laws are strictly local, and cannot have any operation beyond the jurisdiction of the country where they were enacted. Scoville v. Canfield, 14 Johns. 338 (1817).

² Corning v. McCullough, 1 N. Y. 47 (1847); Freeland v. McCullough, 1 Denio, 414 (1845); Hodgson v. Cheever, 8 Mo. App. 318 (1880); Manville v. Edgar, 8 Mo. App. 324 (1880); Queenan v. Palmer, 117 Ill. 649 (1886); Aultman's Appeal, 98 Pa. St. 505 (1881); Sackett's Harbor Bank v. Blake, 3 Rich. Eq. (S. C.) 225 (1851); Woods v. Wicks, 7 Lea (Tenn.), 40 (1881); *Ex parte* Van Riper, 20 Wend. 614 (1839); McDonough v. Phelps, 15 How. Pr. 372 (1856); Lowry v. Inman, 46 N. Y. 119 (1871). See also Paine v. Stewart, 33 Conn. 516 (1866); Bond v. Appleton, 8 Mass. 472 (1812); Hutchins v. New England Coal Min. Co., 86 Mass.

580 (1862); Grand Rapids Sav. Bank v. Warren, 52 Mich. 557 (1884). *Cf.* Bateman v. Service, L. R. 6 App. Cas. 386 (1881); Norris v. Wrenschall, 34 Md. 492 (1871); Terry v. Calnan, 13 S. C. 220 (1879); Tinker v. Van Dyke, 1 Flippin, 521, 532 (1876); S. C., 23 Fed. Cas. 1297, 1301; Strong v. Wheaton, 38 Barb. 616, 625 (1861); Brown v. Hitchcock, 36 Ohio St. 667, 678 (1881); Hatch v. Burroughs, 1 Woods, 439, 443 (1870); S. C., 11 Fed. Cas. 795, 796; Flash v. Conn, 109 U. S. 371 (1883); Fourth Nat. Bank v. Francklyn, 120 U. S. 747 (1887); Cuykendall v. Miles, 10 Fed. Rep. 342 (1882); Nimick v. Mingo Iron Works, 25 W. Va. 184 (1884). *Cf.* Lawler v. Burt, 7 Ohio St. 340 (1857). The stockholder's liability under the New York statute of 1892 is a contractual liability. Close v. Potter, 49 N. E. Rep. 686 (N. Y., 1898).

³ Huntington v. Attrill, 146 U. S. 657 (1892). The court reversed the decision in Attrill v. Huntington, 70 Md. 191 (1889), which refused to enforce in Maryland a judgment ob-

⁴ The New York statute making officers liable for corporate debts in case they file a false certificate as to the condition of the company is not penal. Hence a judgment in New

York on such a liability may be enforced in Canada. Huntington v. Attrill, [1893] A. C. 150 (1892), reversing the Canadian court below.

dering directors liable may be penal so far as they are concerned, and hence strictly construed, and yet be not "a penal law in the international sense."¹

A different rule prevails as to the statutory liability of corporate officers for failure to file reports, or give certain notices, or make certain contracts. Such liability is generally construed to be penal, and will not be enforced by the courts of other states.²

tained in New York by a corporate creditor against an officer of the corporation, who, under the statutes of New York, was rendered liable to corporate creditors by reason of signing a false certificate as to the amount of the capital stock of the company. The supreme court of the United States held that such a liability was not penal in the international sense.

¹ *Park Bank v. Remsen*, 158 U. S. 337 (1895). In the case of *New Haven, etc. Co. v. Linden Spring Co.*, 142 Mass. 349 (1886), the court, in refusing to enforce a subscription made to a foreign corporation, without an express promise to pay, said: "That the statutes of a state do not operate extraterritorially, *proprio vigore*, will be conceded. How far they should be enforced beyond the limits of the state which has enacted them must depend on several considerations — as, whether any wrong or injury will be done to the citizens of the state in which they are sought to be enforced; whether the policy of its own laws will be contravened or impaired; and whether its courts are capable of doing complete justice to those liable to be affected by their decrees." To same effect, *Halsey v. McLean*, 94 Mass. 438 (1866). The statutory liability of stockholders in California is a contract liability. *Dennis v. Superior Court*, 91 Cal. 548 (1891). The statutory liability of stockholders in New York business corporations to the extent of their stock until a certificate is filed that

the whole capital stock is paid in is not a penal liability, and it survives the death of a stockholder. *Cochran v. Wiechers*, 119 N. Y. 399 (1890). A statute making the stockholders liable for all debts if certain steps in incorporating are not observed is penal. A repeal of the statute at any time prior to judgment in a case puts an end to liability in that case. *Kleckner v. Turk*, 45 Neb. 176 (1895). As to what is a penal liability, see 28 Am. Law Rev. 518.

² Quoted and approved in *Globe Pub. Co. v. State Bank*, 41 Neb. 175 (1894); *Derrickson v. Smith*, 27 N. J. L. 166 (1858); *First Nat. Bank v. Price*, 33 Md. 487 (1870), where a statute of Pennsylvania imposing liability upon directors and officers contracting or assenting to an indebtedness in excess of the amount of capital was held to be penal. But see, *contra*, *Field v. Haines*, 28 Fed. Rep. 919 (1886). *Halsey v. McLean*, 94 Mass. 438 (1866); *Bird v. Hayden*, 1 Rob. 383 (1863); *Union Iron Co. v. Pierce*, 4 Biss. 327 (1869); S. C., 24 Fed. Cas. 583. The twelfth section of the New York Manufacturing Companies Act (Laws of 1848, ch. 40), to the effect that the corporate officers should be liable for the debts of the corporation in case they failed to make an annual public report of the business of the corporation, was generally spoken of as being penal in its character. *Chase v. Curtis*, 113 U. S. 452 (1885); *Stokes v. Stickney*, 96 N. Y. 323 (1884); *Pier v. Hanmore*, 86 N. Y. 95 (1881); *Pier v.*

This question of whether the liability is a penalty arises often in ascertaining what particular statute of limitations applies.¹ There can never be such a thing as a vested right to enforce a

George, 86 N. Y. 613 (1881); Veeder v. Baker, 83 N. Y. 156 (1880); Knox v. Baldwin, 80 N. Y. 610 (1880); Easterly v. Barber, 65 N. Y. 252 (1875); Wiles v. Suydam, 64 N. Y. 173 (1876); Jones v. Barlow, 62 N. Y. 202 (1875); Merchants' Bank v. Bliss, 35 N. Y. 412 (1866); Gadsden v. Woodward, 103 N. Y. 242 (1886). So also of the statutory liability of the stockholders if the capital stock was not fully paid up and a certificate filed. Howell v. Roberts, 29 Neb. 483 (1890); Halsey v. McLean, 94 Mass. 438 (1866); Erickson v. Nesmith, 86 Mass. 233 (1862); Mitchell v. Hotchkiss, 48 Conn. 9 (1880); Steam Engine Co. v. Hubbard, 101 U. S. 188 (1879); Savings Assoc. v. O'Brien, 51 Hun. 45 (1889). But Huntington v. Attrill, 146 U. S. 657 (1892) (rev'g Attrill v. Huntington, 70 Md. 191—1889), decided otherwise, and the decision of the House of Lords is to the same effect. Huntington v. Attrill, [1893] A. C. 150. In New York, if the suit is commenced by summons only to recover a penalty, a reference must be made on the summons to the statute. Code Civ. Proc., § 1897. A stockholder's liability for failure of the directors to file a certificate each year is a penal liability and cannot be enforced in a foreign jurisdiction, and foreign stockholders cannot be sued in their state for contributions towards a penal liability paid by domestic stockholders. Sayles v. Brown, 40 Fed. Rep. 8 (1899). But see Huntington v. Attrill, 146 U. S. 657 (1892), reversing Attrill v. Huntington, 70 Md. 191 (1889). The statutory liability of a director in a national bank is not a penal liability, and it survives the death of the director who is liable. Stevens v. Overstoltz, 43 Fed. Rep. 465 (1890). The statutory liabil-

ity of trustees of clubs for all debts contracted during their term of office is a contract liability. Rogers v. Decker, 131 N. Y. 490 (1892). A liability of stockholders for failure to publish annually a statement of their indebtedness is penal. Globe Pub. Co. v. State Bank, 41 Neb. 175 (1894), overruling Howell v. Roberts, 29 Neb. 483 (1890), and Coy v. Jones, 30 Neb. 798 (1890). A director's liability for failure to make reports is penal. State Sav. Bank v. Johnson, 18 Mont. 440 (1896). A statute rendering the directors liable to corporate creditors in case of fraud or unfaithfulness is not a penal statute. Flowers v. Bartlett, 68 N. W. Rep. 976 (Minn., 1896). A director's statutory liability for receiving deposits after the bank becomes insolvent is penal. Ashley v. Frame, 4 Kan. App. 265 (1896).

¹Gridley v. Barnes, 103 Ill. 211 (1882); Diversey v. Smith, 103 Ill. 378 (1882). See also Cable v. McCune, 26 Mo. 380 (1858); Lawler v. Burt, 7 Ohio St. 340 (1857); Cady v. Smith, 12 Neb. 628 (1882); Knox v. Baldwin, 80 N. Y. 610 (1880). Cf. Duckworth v. Roach, 81 N. Y. 49 (1880); Wiles v. Suydam, 64 N. Y. 173 (1876). The federal courts follow the state decisions. Price v. Yates, 19 Fed. Cas. 1322 (1879). The three years' statute of limitations relative to penalties applies to an action to hold directors liable under a statute making them liable for all debts if they commit *ultra vires* acts which result in insolvency. Merchants' Nat. Bank v. Northwestern Mfg. Co., 48 Minn. 349 (1892). A statutory liability of directors for failure to file reports is penal and subject to the statute of limitations on penalties. A judgment need not be obtained against the corporation first. Larsen v. James, 1 Colo. App. 313

penalty.¹ Until judgment is obtained the legislature may relieve the parties from this penalty.²

The second question is whether the courts of one state will enforce a statutory liability created by another state, when the legal procedure for enforcing that liability is prescribed by the latter state and is not feasible in the former state. As already stated, when the statute creating the liability prescribes the procedure for enforcing it, that procedure is exclusive of all other remedies.³ Hence, instances have occurred in which the enforcement of this statutory liability in another state has failed, by reason of difficulties attending the legal procedure to be used in enforcing that liability.⁴ The liability will be enforced only when it may be enforced by the procedure of the state wherein the enforcement is sought.⁵

(1892). A penal liability of a director ends in case of his death, unless it is already merged into a judgment, in which case it survives. *Carr v. Rischer*, 119 N. Y. 117 (1890). The statutory liability in Oregon of directors for declining dividends from the capital stock is penal. *Patterson v. Thompson*, 86 Fed. Rep. 85 (1898). The statutory provision in Illinois making officers liable for debts in excess of the capital stock is not a penal liability, and is not barred by the two-year statute of limitations. It may be enforced in equity. *Woolverton v. Taylor*, 132 Ill. 197 (1890).

¹ *Yeaton v. U. S.*, 5 Cranch, 281 (1809); *Norris v. Crocker*, 13 How. 429 (1851). See also *Huntington v. Attrill*, 146 U. S. 657, 679 (1892), a *dictum*.

² Cooley's Constitutional Limitations (5th ed.), p. 445, note. A penal liability of stockholders ceases by the passage of a statute repealing it, unless such liability has passed into a judgment. *Globe Pub. Co. v. State Bank*, 41 Neb. 175 (1894). A penal liability repealed is ended. *Hogue v. Capital Nat. Bank*, 47 Neb. 929 (1896). The repeal of a statute which imposes a penalty destroys any action then pending to recover such penalty.

Fisher v. New York Cent. etc. R. R., 46 N. Y. 644, 657 (1871); and see note in 4 Denio, 377, to case of *Palmer v. Conly*; *Yeaton v. U. S.*, 5 Cranch, 281 (1809); *Norris v. Crocker*, 13 How. 429 (1851); also § 497, *infra*.

³ See § 220, *supra*.

⁴ *Lowry v. Inman*, 46 N. Y. 119 (1871), where the remedy prescribed by the Georgia corporation was an execution levied on stockholders' property, and based on the judgment against the corporation only. *Nimick v. Mingo Iron Works*, 25 W. Va. 184 (1884). See also *Savings Assoc. v. O'Brien*, 51 Hun, 45 (1889). Where the statute provides that the creditor's remedy shall be by bill in equity, and that all stockholders shall be joined, the liability cannot be enforced in a state where this remedy is not possible. *Erickson v. Nesmith*, 86 Mass. 233 (1862); S. C., 81 Mass. 221 (1860). Cf. S. C., 46 N. H. 371 (1866).

⁵ *Lowry v. Inman*, 46 N. Y. 119 (1871); *Drinkwater v. Portland Marine R. R.*, 18 Me. 35 (1841); *Nimick v. Mingo Iron Works*, 25 W. Va. 184 (1884); *Christensen v. Eno*, 106 N. Y. 97 (1887); *Erickson v. Nesmith*, 81 Mass. 221 (1860). Cf. *Taft v. Ward*, 106 Mass. 518 (1871).

During the past five years this question of enforcing a statutory liability created by the laws of another state has come prominently before the courts. Especially has this been the case with stockholders in insolvent Kansas corporations. The result is that the courts have begun to refuse to enforce the liability, and, following the old Massachusetts decisions, have declined to aid the corporate creditor as against resident stockholders. The New York court of appeals especially has clearly and boldly decided that on general grounds of public policy it will not enforce the statutory liability of New York stockholders in Kansas corporations.¹ There are many other decisions to practically the same effect, not only as to the Kansas liability, but as to the liability in Ohio and Illinois.²

¹ In the important case of *Marshall v. Sherman*, 148 N. Y. 9 (1895), rev'g 84 Hun, 186; the New York court of appeals held that the double liability of stockholders in Kansas corporations would not be enforced by the New York courts. The court said that such enforcement would be inequitable, inasmuch as all the stockholders and creditors could not be brought into the action; also that the liability, while arising on contract, was somewhat penal in its nature; also that the Kansas statute prescribed the mode of enforcing the liability, and hence the enforcement must be local; and also that to enforce such a liability would encourage parties to buy up claims for the purpose of instituting suits of this character. The court said: "It is to be noticed that the party seeking to enforce such a statute in a foreign jurisdiction has been quite uniformly defeated."

² The United States court sitting in Massachusetts will not enforce the statutory liability of Massachusetts stockholders in an Ohio corporation. *State Nat. Bank v. Sayward*, 86 Fed. Rep. 45 (1898). In *Coffing v. Dodge*, 167 Mass. 231 (1897), the court refused to enforce the Kansas statutory liability because the complaint did not

allege that the liability was on contract arising from subscription for stock, and did not allege that such liability had been so construed in Kansas, and did not make other allegations to show that no injustice could be done to any one by the court entertaining the suit. The supreme court of Illinois refused to enforce the statutory liability of stockholders in a Kansas corporation on the ground that the special remedy provided by the Kansas statute could be enforced only in the state of Kansas. *Tuttle v. National Bank*, 161 Ill. 497 (1896). Where a special remedy is given for the enforcement of a stockholder's statutory liability, that liability cannot be enforced in another state. *Fowler v. Lamson*, 146 Ill. 472 (1893), refusing to enforce the liability of stockholders in a Kansas corporation. The California courts will not enforce the subscription liability of stockholders in an Illinois corporation where the Illinois statutes prescribe that the remedy may be by garnishment. *Russell v. Pacific R'y*, 113 Cal. 258 (1896). A suit cannot be maintained in New York to enforce a stockholder's liability under the Ohio statutes, because the Ohio statutes prescribe a remedy, and this remedy is not available in New York.

Where suit is brought in one state on a statutory liability incurred in another state, it is a good defense that enough of the

Barnes v. Wheaton, 80 Hun, 8 (1894). The New York courts will refuse to entertain a suit in equity brought to enforce the statutory liability of stockholders in an Ohio corporation. Not only does the Ohio statute give a local remedy, but it is impracticable to adjust all the liabilities and rights in New York with only a few of the parties before the court. In a suit at law it may be different. *Cleveland, etc. R'y v. Kent*, 87 Hun, 329 (1895), with a remarkably well-reasoned opinion by O'Brien, J. The Illinois courts will not enforce the statutory liability of Illinois stockholders in a Michigan corporation where the Michigan courts have never construed the statute and no bill has been filed there to determine the debts, assets, and various liabilities. *Young v. Farwell*, 139 Ill. 326 (1891). A Wisconsin court will not enforce the statutory liability of a resident stockholder in a Michigan mining company for debts due to laborers where the Michigan statute gives, as a remedy for enforcing such liability, a joint action at law against both the corporation and the stockholder. *May v. Black*, 77 Wis. 101 (1890). A resident of New York cannot bring suit in Massachusetts against a resident of California to hold him liable as a stockholder in a Kansas corporation, under a statute making him liable when the remedy against the corporation has been exhausted, even though judgment against the latter was obtained in Kansas. The courts of Massachusetts have uniformly refused to enforce the statutory liability in corporations organized in other states. *Bank of N. America v. Rindge*, 154 Mass. 203 (1891). In a bill in equity in the federal court in Pennsylvania, brought by a citizen of Indiana to enforce the

liability of residents of Pennsylvania as stockholders in a Minnesota corporation, also asking for a receiver and an accounting, the corporation is a necessary party defendant, and if not served the suit fails, inasmuch as an accounting may show that the company has means to pay the debt. The complainant had already obtained a judgment. *Elkhart Nat. Bank v. Northwestern, etc. Co.*, 84 Fed. Rep. 76 (1897). A person residing in Wyoming cannot be held liable in Wyoming as a stockholder in a Utah corporation until after a suit in equity has determined the amount of deficit. *McLaughlin v. O'Neill*, 51 Pac. Rep. 243, 251 (Wyo., 1897). The liability of an Illinois stockholder in a Kansas corporation for the debts of the corporation begins to run from the time he became a stockholder and expires in five years. *Hutchings v. Lampson*, 82 Fed. Rep. 960 (1897).

The following cases present a contrary view of this subject: In *Oxford Nat. Bank v. Whitman*, 76 Fed. Rep. 697 (1896), the court held that the liability under the Kansas statute might be enforced in the federal court in New York state. It seems that in this case no execution was returned unsatisfied in New York state. In *Rhodes v. U. S. Nat. Bank*, 66 Fed. Rep. 512 (1895) the federal court in Illinois enforced the statutory liability in a Kansas corporation and followed the Kansas decisions as to the nature of and remedy for the liability. In *Whitman v. National Bank*, 83 Fed. Rep. 288 (1897), a Pennsylvania bank, as a judgment creditor of a Kansas corporation, enforced in the United States court in New York the statutory liability of a New York stockholder in such Kansas corporation. The action was at law. The fact that a Kansas corporation

defendant's property in such latter state has been levied upon to satisfy the claim.¹

Generally, the statute creating the liability must be pleaded where the action is in another state.² The United States courts, however, take judicial notice of the statutes of all the states; and in those courts this part of the pleading may be omitted.³ The courts of one state will entertain a bill of discovery filed by corporate creditors to obtain the names of stockholders in a corporation in another state, with a view to enforcing their statutory liability in the latter state.⁴

Before suit can be brought against a stockholder, a judgment

is in the hands of a receiver does not prevent a judgment creditor enforcing in New York the stockholders' statutory liability. *American, etc. Co. v. Woodworth*, 82 Fed. Rep. 269 (1897).

The federal court in New Hampshire sustained an action of debt at law to enforce the statutory liability of a stockholder in a Kansas corporation, in the case of *McVickar v. Jones*, 70 Fed. Rep. 754 (1895), the court following the Kansas decisions as to the remedy at law. In *Guerney v. Moore*, 131 Mo. 650 (1895), the supreme court of Missouri held that a Kansas statutory liability could be enforced in Missouri. The Kansas statutory liability is enforceable in California. *Ferguson v. Sherman*, 116 Cal. 169 (1897). A demurrer to a declaration to enforce the statutory liability of a stockholder in a Kansas corporation was overruled in *Hancock Nat. Bank v. Ellis*, 166 Mass. 414 (1896). The statutory liability of stockholders in a California corporation may be enforced by an action at law in Oregon, although the liability of stockholders in an Oregon corporation may be enforced only by a suit in equity. *Aldrich v. Anchor Coal, etc. Co.*, 24 Oreg. 32 (1893). The statutory liability of directors in New York corporations may be enforced in the federal courts. *International Bank v. Faber*, 79 Fed. Rep. 919 (1897).

As enforcing statutory liabilities, see *Howarth v. Ellwanger*, 86 Fed. Rep. 54 (1898); *Mechanics' Sav. Bank v. Fidelity, etc. Co.*, 87 id. 113 (1898); *Western Nat. Bank v. Lawrence*, 76 N. W. Rep. 105 (Mich., 1898). *Contra, James, etc. Co. v. Libbey*, 85 Fed. Rep. 821 (1898); *Schiffer v. Trustees*, 87 id. 166 (1898); *Elkhart Nat. Bank v. Northwestern, etc. Co.*, 87 id. 252 (1898); *Hancock Nat. Bank v. Farnum*, 40 Atl. Rep. 341 (R. I., 1898).

¹ *Cushing v. Perot*, 175 Pa. St. 66 (1896).

² *Salt Lake, etc. Bank v. Hendrickson*, 40 N. J. L. 52 (1878), holding that the foreign statute, when pleaded, must be set forth in substance; and an averment "pursuant to the statute" is insufficient.

³ *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747 (1887); *Newberry v. Robinson*, 36 Fed. Rep. 841 (1888). In New Hampshire it is held to be necessary to set out in the pleading the remedy provided by the laws of the state creating the corporation and the liability, and to show that this remedy can be employed in the court where suit is brought. *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114 (1875). As to the advantages of a suit in the federal courts, see 28 Am. L. Rev. 518.

⁴ *Post v. Toledo, etc. R. R.*, 144 Mass. 341 (1887).

must be obtained and execution returned unsatisfied in the state where suit is brought, unless it is impossible.¹

Where the stockholders in an insolvent California corporation formed an Illinois corporation and exchanged their stock for stock in the latter, in order to avoid the California statutory liability, and then transferred the property of the California corporation to the Illinois corporation, the Illinois court held them liable on the new stock to the extent that the actual value of the property was less than the par value of the stock.²

§ 224. *How far the judgment against the corporation is conclusive of the creditor's claim.*—In general, the judgment in these cases against the corporation is conclusive as to the amount and validity of the creditor's claim. Consequently, in most of the states, when suit is brought to enforce the stockholder's statutory liability, that judgment can be impeached by him only for fraud or want of jurisdiction.³

¹ See § 200, *supra*; also p. 408, n. 1. An action in New York, to enforce the statutory liability of a stockholder in a New York corporation, does not lie, where the only execution issued was in Colorado. *Rocky Mountain Bank v. Bliss*, 89 N. Y. 338 (1882); *Dean v. Mace*, 19 Hun, 391 (1879); *Sumner v. Marcy*, 3 Woodb. & M. 105; S. C., 23 Fed. Cas. 384 (1847). In *McVickar v. Jones*, 70 Fed. Rep. 754 (1895), no judgment against the corporation had been recovered in New Hampshire, the place of suit. In enforcing in the federal court in New York a stockholder's statutory liability in a Kansas corporation, the suit may be based upon a judgment against the corporation obtained in Kansas. *American, etc. Co. v. Woodworth*, 79 Fed. Rep. 951 (1897). If the execution is issued in the county of the chief place of business as required by statute, it need not be issued in other counties to enforce stockholders' liability for labor debts. *Ripley v. Evans*, 87 Mich. 217 (1891).

² *Sprague v. Nat. Bank of America*, 50 N. E. Rep. 19 (Ill., 1898).

³ *Thayer v. New England Lithog.*

Co., 108 Mass. 523 (1871); *Borland v. Haven*, 37 Fed. Rep. 394 (1888); *Came v. Brigham*, 39 Me. 35 (1854); *Milliken v. Whitehouse*, 49 Me. 527 (1860); *Wilson v. Pittsburgh, etc. Coal Co.*, 43 Pa. St. 424 (1862); *Donworth v. Coolbaugh*, 5 Iowa, 300 (1857); *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896); *Holland v. Duluth, etc. Co.*, 65 Minn. 324 (1896); *Farnum v. Ballard Vale Machine Shop*, 66 Mass. 507 (1853); *Handrahan v. Cheshire Iron Works*, 86 Mass. 396 (1862); *Gaskill v. Dudley*, 47 Mass. 546 (1843); *Hampson v. Weare*, 4 Iowa, 13 (1856); *Bullock v. Kilgour*, 39 Ohio St. 543 (1883). *Cf. Merrill v. Suffolk Bank*, 31 Me. 57 (1849); *Holyoke Bank v. Goodman Paper Mfg. Co.*, 63 Mass. 576 (1852); *Bank of Australasia v. Nias*, 16 Q. B. 717; S. C., 20 L. J. (Q. B.) 284 (1851), and § 209, *supra*. Stockholders sued on their liability may show that the judgment was obtained by default, and that a valid defense exists to the original claim. *Irons v. Manufacturers' Nat. Bank*, 36 Fed. Rep. 843 (1888). A stockholder cannot attack the debt on the ground of fraud where the debt was incurred in the adjut-

In some jurisdictions, however, this judgment against the corporation is only *prima facie* evidence of the validity and amount of the creditor's claim.¹ And in New York judgment against the corporation and the execution returned wholly or partially unsatisfied are evidence only that the corporation cannot pay its debts. They only serve to show that the creditor has taken the necessary precedent steps to collect his claim from the corporate assets. But he cannot rely upon the judgment obtained against the corporation to establish his right to recover against the shareholder. It is not even *prima facie* evidence either of the amount or validity of his claim. The stockholder may set up any defense that the corporation might have set up.² This means that the corporate creditor is obliged

ment of claims, and the statute of limitations is a bar to any fraud in the settlement. *Railroad Co. v. Smith*, 48 Ohio St. 219 (1891). In *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67 (1890), the supreme court allowed stockholders, who had been sued on their statutory liability on national bank stock, to go back of the judgment against the bank, such judgment having been rendered after the bank had gone into liquidation. In enforcing a director's statutory liability in Colorado for failure to file reports, the judgment creditor of the corporation may sue on his judgment, and need not sue on his original claim. *Tabor v. Commercial Nat. Bank*, 62 Fed. Rep. 383 (1894). The complaint need not set out the original cause of action. It is sufficient if it sets out the judgment against the corporation. *McVickar v. Jones*, 70 Fed. Rep. 754 (1895). In *Whitman v. National Bank*, 83 Fed. Rep. 288 (1897), the creditor, in a suit to enforce the statutory liability of stockholders, put in evidence not only the judgment against the corporation, but proved the original cause of action against the corporation. The judgment against a corporation is conclusive as to the amount of the debt and the liability of the corpora-

tion. *Ball v. Reese*, 50 Pac. Rep. 875 (Kan., 1897). Cf. *Grund v. Tucker*, 5 Kan. 70 (1869).

¹ *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385 (1869); *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557 (1894); *Merchants' Bank v. Chandler*, 19 Wis. 435 (1865). And see *Neilson v. Crawford*, 52 Cal. 248 (1877), passing also on the admissibility of the books of the corporation to prove its indebtedness to a creditor in an action against a stockholder.

² *Moss v. McCullough*, 5 Hill, 131 (1843). [This case was reversed upon another point in *McCullough v. Moss*, 5 Denio, 567 (1846).] *McMahon v. Macy*, 51 N. Y. 155 (1872); *Miller v. White*, 50 N. Y. 137 (1872); *Chase v. Curtis*, 113 U. S. 452 (1884); *Esmond v. Bullard*, 16 Hun, 65 (1878); *Conant v. Van Schaick*, 24 Barb. 87 (1857); *Truesdell v. Chumar*, 75 Hun, 416 (1894). But see *Slee v. Bloom*, 20 Johns. 669 (1822); *Belmont v. Coleman*, 21 N. Y. 96 (1860); *Hastings v. Drew*, 76 N. Y. 9 (1879); *Lawyer v. Rosebrook*, 48 Hun, 453 (1888); *Moss v. Oakley*, 2 Hill, 265 (1842); *Berridge v. Abernethy*, 24 N. Y. Week. Dig. 513 (1886). Cf. § 209, *supra*. *Stephens v. Fox*, 83 N. Y. 313 (1881), in which the ground is taken that the judgment in these cases is *prima facie* evi-

to prove his cause of action over again, and repeat what he has already proved in his action against the corporation. Such, also, seems to be the rule in Illinois.¹ In New York a stockholder may attack the validity of a corporate note, even in *bona fide* hands, in a suit brought to enforce the statutory liability.²

In any jurisdiction where the stockholders are, by statute, made liable for only a certain class of the corporate indebtedness, it is plain that they cannot be charged upon a judgment recovered against the corporation, unless it be shown that the claim in controversy comes within the class upon which they are liable.³

dence or more, without, however, overruling the earlier cases; *Trippe v. Hunccheon*, 82 Ind. 307 (1882), where a complaint founded on the judgment was held bad on demurrer because the liability of the stockholder was looked upon as being upon the original debt and not upon the judgment; *Southmayd v. Russ*, 3 Conn. 52 (1819), where, for the same reason, a proceeding by *scire facias* was not allowed to be maintained; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (1875). Practically the corporate creditor must bring his action anew against the shareholder upon his original demand. *Bailey v. Bancker*, 3 Hill, 188 (1842); *Kincaid v. Dwinelle*, 59 N. Y. 548 (1875); *Moss v. Averell*, 10 N. Y. 449 (1853); *Witherhead v. Allen*, 4 Abb. App. Dec. 628 (1867). As to the effect of recitals in a decree against the corporation, see *Chesnut v. Pennell*, 92 Ill. 55 (1879). This judgment against the corporation is admissible only as evidence that the condition precedent to his right to recover from the shareholder has been complied with. *Wheeler v. Miller*, 24 Hun, 541 (1881); *S. C.*, 90 N. Y. 353 (1882); *Strong v. Wheaton*, 38 Barb. 616 (1861). But *cf.* *Tyng v. Clarke*, 9 Hun, 269 (1876). See also *Bissit v. Kentucky River Nav. Co.*, 15 Fed. Rep. 353 (1882), and the annotation; *Union*

Bank v. Wando Min. etc. Co., 17 S. C. 339 (1881). The judgment may avail, however, in these cases to prevent the statute of limitations from barring the action. *Van Cott v. Van Brunt*, 2 Abb. N. C. 283, 294 (1877); reversed on other points, 82 N. Y. 535 (1880). See 53 Pac. Rep. 769.

¹ *Chesnut v. Pennell*, 92 Ill. 55 (1879). In *Quick v. Lemon*, 105 Ill. 578 (1883), where the corporation had not pleaded a counter-claim against a creditor in a suit at law, a stockholder was permitted to file a cross-bill in a chancery suit brought by judgment creditors against the corporation and certain stockholders. The stockholder may set up that the plaintiff's claim grew out of business transacted by the corporation after it had been put into liquidation by the court. *Richmond v. Irons*, 121 U. S. 27 (1887). Evidence competent and sufficient to establish a liability as against the corporation is sufficient as against the stockholder. *McGowan v. McDonald*, 111 Cal. 57 (1896).

² *Close v. Potter*, 49 N. E. Rep. 686 (N. Y., 1898).

³ *Bohn v. Brown*, 33 Mich. 257 (1876); *Wilson v. Pittsburgh, etc. Coal Co.*, 43 Pa. St. 424 (1862); *Conant v. Van Schaick*, 24 Barb. 87 (1857). *Cf.* *Larabee v. Baldwin*, 35 Cal. 155 (1868); *Farnsworth v. Wood*, 91 N. Y. 308

§ 225. *Stockholder's miscellaneous defenses against his statutory liability.*—There are two classes of defenses that may occur to a stockholder to defeat his statutory liability. One class is of defenses that the corporation itself might have set up, or did set up, against the plaintiff when he sought to collect his debt from the corporation. As already explained herein, in some jurisdictions, particularly New York, the stockholder may set up these defenses, although the corporation has failed to establish them. In other and most jurisdictions he cannot.

A second class of defenses includes those which are personal to the particular stockholder, and not such as the corporation might have set up. They are largely such defenses as the stockholder might set up against the corporation to defeat his subscription. They do not refer to the validity of the creditor's debt, but they deny that that particular defendant is one of those who are liable for the corporate debts. There are, in addition to the defenses specified in a previous chapter,¹ several defenses which are peculiar to this statutory liability.

(a) *Release, extension, and renewal.*—A release by the corporate creditor of one shareholder from his proportion of the corporate indebtedness will not operate to release the other shareholders.² Thus, where the shareholders are held to be severally and not jointly liable under the statute, one may be released without releasing the others.³ But whether an extension of time by renewal of note or otherwise, given to the corporation by a creditor, will not discharge a shareholder as to his

(1883). Where stockholders are liable for corporate debts existing on a certain date, the existence of a corporate creditor's debt on that date may be found by evidence other than his judgment against the corporation. *Congdon v. Winsor*, 17 R. L 236 (1891). A statutory liability of directors for debts of the corporation does not render them liable on an accommodation indorsement by the corporation—the indorsement being non-enforceable. *National Park Bank v. Remsen*, 43 Fed. Rep. 226 (1890). Where those stockholders are liable who were such when the debt was incurred, a note given

for an old debt cannot be the basis of liability. *Winona Wagon Co. v. Bull*, 108 Cal. 1 (1895).

¹ Ch. X, *supra*.

² *Herries v. Platt*, 21 Hun, 132 (1880). See also *Prince v. Lynch*, 38 Cal. 528 (1869), holding that the other stockholders liable only proportionately are released only proportionately. The assumption of the corporate debt by a third party may be rescinded. *Borland v. Haven*, 37 Fed. Rep. 394 (1888).

³ *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461 (1843). Cf. *Herries v. Platt*, 21 Hun, 132 (1880).

liability by statute seems uncertain.¹ In New York a renewal note does not stop the prior running of the statute of limitations; and this is the rule where the facts are practically a renewal, even though by a device the new notes run to another

¹ In *Harger v. McCullough*, 2 Denio, 119 (1846), it was held that it would not; while in the later case of *Parrott v. Colby*, 6 Hun, 55 (1875); S. C. aff'd, 71 N. Y. 597 (1877), without expressly overruling *Harger v. McCullough*, it is plainly declared, in making an application of the short statute of limitations provided by the General Manufacturing Act of New York (N. Y. Laws, 1848, ch. 40, § 24), that the liability of shareholders in these cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation. And in accordance with that view, where the effect of the extension granted by the creditor to the corporation had been to postpone the action against the shareholder beyond the time prescribed by the statute within which such an action is maintainable—that is, one year from the time the corporate debt was first due,—it was held that the shareholder was thereby discharged. *Parrott v. Colby*, 6 Hun, 55 (1875); S. C. aff'd, 71 N. Y. 597 (1877); *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (1879); *Hardman v. Sage*, 47 Hun, 230 (1888); *Stilphen v. Ware*, 45 Cal. 110 (1872). See also *Jones v. Barlow*, 62 N. Y. 202 (1875); *Bolen v. Crosby*, 49 N. Y. 183 (1872). In *Aultman's Appeal*, 98 Pa. St. 505 (1881), it was held that, where the extension was granted at the request of the directors, the stockholders had assented, and there was no release. A release of the corporation under an insolvency statute is a release of the stockholder's statutory liability. *Mohr v. Minnesota Elev. Co.*, 40 Minn. 343 (1889). See also *Hanson v. Don-*

kersley, 37 Mich. 184 (1877), ruling that the Michigan statute does not make stockholders primarily liable, and holding that the individual liability for corporate debts is discharged by an extension of time and the acceptance of a corporate note. A laborer's statutory right to collect from the stockholders is not waived by taking the corporate note. *Jackson v. Meek*, 87 Tenn. 69 (1888). A partial payment of a creditor's claim by the corporation does not release the directors from their statutory liability. *Fairbanks, etc. Co. v. Macleod*, 8 Colo. App. 190 (1896). A new note for an old debt does not affect an officer's statutory liability for the old debt, unless, of course, the note is paid. *Novelty Mfg. Co. v. Connell*, 88 Hun, 254 (1895). An extension of a note does not release a director from his statutory liability in New York. It merely delays his remedy. *Providence Steam, etc. Co. v. Connell*, 86 Hun, 319 (1895). The statute of limitations begins to run against a bank stockholder's statutory liability from the closing of the doors of the bank. It begins to run against the corporation and stockholders at the same time. *Mitchell v. Beckman*, 64 Cal. 117 (1883). The liability in California of stockholders by statute for corporate debts begins when the debt is contracted, and cannot be extended by the corporation so as to extend this stockholder's liability. *Redington v. Cornwell*, 90 Cal. 49 (1891). The stockholder's liability under the California statute being a liability as a principal debtor, the statute of limitations begins to run as soon as the creditor's right of action against the corporation commences. An exten-

person for the secret benefit of the old holder.¹ It is no defense that the creditor is secured by a mortgage.²

(b) *Liability already paid*.—It is a defense to the stockholder to prove that his full statutory liability has already been paid by him. A stockholder who has voluntarily paid corporate debts to the full extent of his corporate liability is entitled to set up that fact. And when such a payment was *bona fide* it is a bar to an action to collect any further amount.³

sion of the time as to the corporation by renewal notes does not stop the statute of limitations as regards the stockholder's liability. Hyman v. Coleman, 82 Cal. 650 (1890). As to renewal notes affecting a transferrer's liability, see § 259, *infra*. See also § 225 (f); also 155, N. Y. 145.

¹ Close v. Potter, 49 N. E. Rep. 686 (N. Y., 1898). The extension of a debt by taking a note does not delay the application of the statute of limitations so far as a stockholder's liability is concerned. Hardman v. Sage, 124 N. Y. 25 (1890); Blake v. Clausen, 10 N. Y. App. Div. 223 (1896).

² Knowles v. Sandercock, 107 Cal. 629 (1895).

³ Quoted and approved in Hood v. French, 37 Fla. 117 (1896); Garrison v. Howe, 17 N. Y. 458 (1858); Mathez v. Neidig, 72 N. Y. 100 (1878); Lane v. Harris, 16 Ga. 217 (1854); Belcher v. Willcox, 40 Ga. 391 (1869); Robinson v. Bank of Darien, 18 Ga. 65, 109 (1855); Woodruff, etc. Iron Works v. Chittenden, 4 Bosw. (N. Y.) 406 (1859); Boyd v. Hall, 56 Ga. 563 (1876); San José Sav. Bank v. Pharis, 58 Cal. 380 (1881). Cf. Thebus v. Smiley, 110 Ill. 316 (1884), where fraud was involved. As to national banks, see Delano v. Butler, 118 U. S. 634 (1886). *Contra*, Fowler v. Robinson, 31 Me. 189 (1850); Grose v. Hilt, 36 Me. 22 (1853). But when a creditor has actually commenced a suit to enforce the statutory liability of any individual shareholder, it is then too late for that shareholder to defeat the action by

paying some other corporate creditor's claim. Jones v. Wiltberger, 42 Ga. 575 (1871). See also Lane v. Harris, 16 Ga. 217 (1854); Thebus v. Smiley, 110 Ill. 316 (1884); Thompson v. Meisser, 108 Ill. 359 (1884). A contrary conclusion was reached in Richards v. Brice, 3 N. Y. Supp. 941 (Com. Pl. 1889) (see also Chicago v. Hall, 103 Ill. 342 — 1882; State Sav. Assoc. v. Kellogg, 63 Mo. 540 — 1876; Manville v. Roeover, 11 Mo. App. 317, — 1881); but the plain injustice of allowing the stockholder to defeat an action by such a device will not commend such a conclusion. Nor will a shareholder who employed an agent to buy up claims at a discount, and then confessed judgment in favor of that agent, be permitted to plead such a judgment in bar of an action by other creditors. Manville v. Karst, 16 Fed. Rep. 173 (1883). A mortgage by an insolvent stockholder in an insolvent corporation to one of the corporate creditors is a preference to the extent of the stockholder's liability for corporate debts. Gatch v. Fitch, 34 Fed. Rep. 566 (1888); Ingalls v. Cole, 47 Me. 530, 541 (1860), holding that the mere pendency of suits is not a defense for a stockholder in a later action, unless the prior claims have been legally established and his liability exhausted. Payment of the judgments at a discount is no exhaustion of the liability, though the judgments at full value would have exhausted it. Kunkelman v. Rentchler, 15 Ill. App. 271 (1884). The de-

(c) *Set-off*.—Closely related to the defense of payment already made, there is the defense that the defendant stockholder has claims against the corporation, and that he is to be credited to that amount as a set-off.

It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor.¹ But where the shareholder's liability by statute is immediate and personal and several, and any creditor may sue any shareholder, then the shareholder may set off a debt, owing to him from the corporation, when he is sued by a corporate creditor.² A stockholder sued on his statutory liability cannot offset judgments which he has purchased against the corporation, except to the extent that he paid for them.³

defendant is entitled to credit for the amount of corporate debts voluntarily paid by him in good faith or paid by him on execution. *Musgrave v. Glen Elder, etc. Assoc.*, 49 Pac. Rep. 338 (Kan., 1897).

¹ *Re Empire City Bank*, 18 N. Y. 199, 227 (1858); *Matthews v. Albert*, 24 Md. 527 (1866); *Briggs v. Cornwell*, 9 Daly (N. Y.), 436 (1881); *Hobart v. Gould*, 8 Fed. Rep. 57 (1881); *Hillier v. Allegheny Mut. Ins. Co.*, 3 Pa. St. 470 (1846); *Lawrence v. Nelson*, 21 N. Y. 158 (1860); *Thebus v. Smiley*, 110 Ill. 316 (1884); *Witters v. Sowles*, 32 Fed. Rep. 130 (1887); *Ball Elect. Light Co. v. Child*, 68 Conn. 522 (1897). See also *Clapp v. Wright*, 21 Hun, 240 (1880); *Buchanan v. Meisser*, 105 Ill. 638 (1883). A holder of stock in a national bank is not entitled to offset against an assessment ordered by the comptroller upon his stock the amount of his deposits at the time the bank became insolvent. *Wingate v. Orchard*, 75 Fed. Rep. 241 (1896).

² *Mathez v. Neidig*, 72 N. Y. 100 (1878); *Agate v. Sands*, 73 N. Y. 620 (1878); *Christensen v. Colby*, 43 Hun, 362 (1887); *Tallmadge v. Fishkill Iron*

Co., 4 Barb. 382 (1848); *Boyd v. Hall*, 56 Ga. 563 (1876); *Hood v. French*, 37 Fla. 117 (1896); *Remington v. King*, 11 Abb. Pr. 278 (1858). *Cf. Wheeler v. Millar*, 90 N. Y. 353, 362 (1882). The defendant may set off a corporate indebtedness due to himself. *Musgrave v. Glen Elder, etc. Assoc.*, 49 Pac. Rep. 338 (Kan., 1897). *Cf. 87 Fed. Rep. 113.*

³ A shareholder cannot himself buy in claims at a discount, and then set them off at their face value in an action to enforce his statutory liability to creditors. *Gauch v. Harrison*, 12 Ill. App. 457 (1883). See also *Thompson v. Meisser*, 108 Ill. 359 (1884); *Diven v. Phelps*, 34 Barb. 224 (1861). A stockholder can defeat his statutory liability by offsetting judgments against the corporation, purchased by himself, but only to the extent that he paid for the judgments. *Bulkley v. Whitcomb*, 49 Hun, 290 (1888); *Lingle v. National Ins. Co.*, 45 Mo. 109 (1869); *Holland v. Heyman*, 60 Ga. 174 (1878). The stockholder cannot purchase claims against the corporation at a discount and set them off, but can set them off for the amount paid by him for them, even though they

(*d*) *Interest*.—In South Carolina, Maine, and Illinois,¹ the shareholder is not liable for interest on the amount for which the statute makes him answerable, and when he pays the principal sum the whole liability is discharged. In New York interest is collectible from the time the suit to enforce is commenced, instead of beginning from the time when judgment is entered.²

are purchased in an agent's name. *Abbey v. Long*, 44 Kan. 688 (1890). A stockholder who is also a director and is sued on his statutory liability as a stockholder cannot set off a judgment against the insolvent company, which judgment he purchased for a nominal sum. *Bulkley v. Whitcomb*, 121 N. Y. 107 (1890). The shareholder's right to set off his claim against the corporation in defense to an action against him to enforce his statutory liability may sometimes be a matter of *bona fides*. *Boyd v. Hall*, 56 Ga. 563 (1876); *Belcher v. Willcox*, 40 Ga. 391 (1869); *Thompson v. Meisser*, 108 Ill. 359 (1884); *Buchanan v. Meisser*, 105 Ill. 638 (1883); *Welles v. Stout*, 38 Fed. Rep. 807 (1889). For cases where the stockholder brings action as a corporate creditor, see *Terry v. Bank of Cape Fear*, 20 Fed. Rep. 777 (1884); *Weber v. Fickey*, 47 Md. 196 (1877). See also *Emmert v. Smith*, 40 Md. 123 (1874), and §§ 193, 194, *supra*; *Hollister v. Hollister Bank*, 2 Abb. App. Dec. 367 (1865). In this case stockholders of an insolvent bank, after paying the judgments had against them to enforce their individual liabilities, turned around and asked to be made, to the extent of those judgments, creditors of the bank, and thus entitled to participate *pro rata* with other creditors. *Held*, nothing is to be repaid to the stockholders until all the debts of the bank are paid. Where a stockholder is liable by statute and is also a creditor of the insolvent corporation, the

court will order a set-off. *Sowles v. Witters*, 40 Fed. Rep. 413 (1889). *Cf.* S. C., 39 Fed. Rep. 403. See also § 218, *supra*; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460 (1889). See a criticism on this case in § 193, n., *supra*.

¹*Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. (S. C.) 225 (1849); *Cole v. Butler*, 43 Me. 401 (1857); *Munger v. Jacobson*, 99 Ill. 349 (1881). See *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557 (1884); *Cleveland v. Burnham*, 64 Wis. 347 (1885); *Mathis v. Pridham*, 1 Tex. Civ. App. 58 (1892); 75 N. W. 380.

²*Handy v. Draper*, 89 N. Y. 334 (1882); *Burr v. Wilcox*, 22 N. Y. 551 (1860). To same effect, *Mason v. Alexander*, 44 Ohio St. 318 (1886). *Cf.* *Casey v. Galli*, 94 U. S. 673 (1876); *Richmond v. Irons*, 121 U. S. 27 (1887). Where a referee computed the interest on the plaintiff's claim from the date on which it became due from the company instead of from the day the suit against the shareholder was commenced, it appearing that the indebtedness was less than the amount of the shareholder's liability, and that the allowance of interest did not swell it beyond that limit, the court of appeals held such a computation no error. *Wheeler v. Millar*, 90 N. Y. 353, 362 (1882). Interest on the judgment is allowed in a suit to enforce a stockholder's liability. *Shickle v. Watts*, 94 Mo. 410 (1888). Interest is allowed from the day when the referee ascertains and reports the debts of the corporation. *National Com. Bank v. McDonnell*, 92 Ala. 387 (1891).

(e) *Costs*.—Although it is a condition precedent to the action against the shareholder that a judgment be recovered against the corporation, it has been held no part of the shareholder's statutory liability to pay the costs of obtaining that judgment. Accordingly a judgment against the shareholder was held not to include any part of the costs of the proceeding against the corporation; but there has been strong dissent from this doctrine.¹

(f) *Statute of limitations*.—Where the liability of the shareholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the shareholder when the debt matures against the corporation.²

¹ *Bailey v. Bancker*, 3 Hill, 188 (1842); *Richmond v. Irons*, 121 U. S. 27 (1887); *Rorke v. Thomas*, 56 N. Y. 559, 565 (1874); *Miller v. White*, 50 N. Y. 137 (1872). *Cf.* *Veeder v. Mudgett*, 27 Hun, 519 (1882). It is possible that the rule might be otherwise in a case where the judgment is held to be conclusive as against the shareholder. So in Michigan. *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 557 (1884). A judgment for costs against a corporation may be enforced against the director's statutory liability. *Allen v. Clark*, 108 N. Y. 269 (1888). Costs may be collected against stockholders in suits to enforce this liability. *Irons v. Manufacturers' Nat. Bank*, 36 Fed. Rep. 843 (1888), holding that a creditor enforcing the stockholders' liability in behalf of himself and other creditors may have his costs. The receiver's expenses may also be recovered, except that the statutory liability shall not be exceeded. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896). Where the creditor sues the corporation first without being obliged so to do, and then sues the director on his statutory liability, the director cannot be held for the costs included in the judgment against the corporation, the suit against the corporation being unnecessary. *Green v. Easton*, 74 Hun, 329 (1893).

² *Davidson v. Rankin*, 34 Cal. 503 (1868); *Lindsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 97 (1842); *Godfrey v. Terry*, 97 U. S. 171 (1877); *Conklin v. Furman*, 8 Abb. Fr. (N. S.) 161 (1865); *Schalucky v. Field*, 124 Ill. 617 (1888). Compare *Carrol v. Green*, 92 U. S. 509 (1875); *Terry v. Tubman*, 92 U. S. 156 (1875); *Terry v. McLure*, 103 U. S. 442 (1880); *Corning v. McCullough*, 1 N. Y. 47 (1847); *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (1879). See also *Terry v. Calnan*, 13 S. C. 220 (1879); *Lawler v. Burt*, 7 Ohio St. 340 (1857); *King v. Duncan*, 38 Hun, 461 (1886); *Stilphen v. Ware*, 45 Cal. 110 (1872), holding that, under the California statute of limitations, the three years begin to run from the time the debt was due, and is not extended by a judgment obtained against the corporation. Where the statute of limitations runs from the creation of the liability, it commences when a note is given and not when it becomes due. *Hunt v. Ward*, 99 Cal. 612 (1893). Where the suit against the stockholders must be brought within three years after the liability is created, the date of a note governs. *Bank of San Luis Obispo v. Pacific, etc. Co.*, 103 Cal. 594 (1894). The state statute of limitations as to executors and estates will be applied by the federal courts to suits by a receiver for the enforce-

But when the creditor must first obtain a judgment against the corporation and sue out an execution, which must be duly returned wholly or partially unsatisfied before the cause of action arises against the shareholder on his statutory liability, then the statute of limitations commences to run upon the return of the execution.¹

ment of a stockholder's liability in a national bank. *Butler v. Poole*, 44 Fed. Rep. 586 (1890). The stockholder's statutory liability dates from and is based upon the original debt created by the corporation and not from or upon the judgment against the corporation. *Newberry v. Robinson*, 41 Fed. Rep. 458 (1890). An action based on the notes is not on the debt for which the notes were given. *Griffith v. Green*, 13 N. Y. Supp. 470 (1891). The statute of limitations under the Ohio law begins to run against the stockholder's liability from the time when the corporation makes an assignment for the benefit of creditors, even though no judgment has been obtained by the creditor. *Barrick v. Gifford*, 47 Ohio St. 180 (1890). The statute of limitations does not begin to run until the execution is returned unsatisfied or the corporate property is put in process of application to the payment of the corporate debts, as upon dissolution, or bankruptcy, or appointment of a receiver, or assignment for the benefit of creditors. *Bronson v. Schneider*, 49 Ohio St. 438 (1892); *Younglove v. Lime Co.*, 49 Ohio St. 663 (1892), the latter case holding also that the appointment of a receiver for the purpose of carrying on the business did not set the statute running. The statute of limitations begins to run against the statutory liability as soon as the corporate property is placed in the hands of an assignee in insolvency, or bankruptcy, or of a receiver to wind up its affairs. *King v. Armstrong*, 50 Ohio St. 222 (1893). In a suit by one creditor for the benefit of all, other cred-

itors may come in, although the statute of limitations would be a bar against a separate suit by them. *Barrick v. Gifford*, 47 Ohio St. 180 (1890). See also § 225 (a), *supra*, and § 259, notes, *infra*.

¹ *Handy v. Draper*, 89 N. Y. 334 (1882); *Merritt v. Reid*, 13 N. Y. Week. Dig. 453 (1882); *Longley v. Little*, 26 Me. 162 (1846). The statute of limitations does not begin to run against the claim until the return of the execution unsatisfied in *Kansas Bank of North America v. Rindge*, 57 Fed. Rep. 279 (1893). In *Terry v. Tubman*, 92 U. S. 156 (1875), where the charter of a bank contained a provision making the shareholders individually liable for the ultimate redemption of its bills, the liability of the shareholders was held to arise, and hence the statute of limitations to commence to run in their favor, upon the open and notorious insolvency of the bank. So, likewise, where shareholders were made individually liable "upon the failure of the bank," it was held that, the liability arising upon the failure, the statute of limitations began to run at that time. *Carrol v. Green*, 92 U. S. 509, 511 (1875). To the same effect is *Baker v. Atlas Bank*, 50 Mass. 182 (1845); *Terry v. McLure*, 103 U. S. 442 (1880); *Godfrey v. Terry*, 97 U. S. 171 (1877). The case of *Terry v. Anderson*, 95 U. S. 628 (1877), sustains the constitutionality of a statute shortening the statute of limitations herein. The case *Re Bank of Sing Sing*, 32 Hun, 462 (1884); affirmed in 96 N. Y. 672, held that twenty years' delay by receiver in making report bars any as-

It is a general rule of law that the statute of limitations applicable to any ordinary action to enforce a contract is the one applicable to the action to enforce the statutory liability of shareholders in incorporated companies.¹

Accordingly, the suit must usually be commenced within six years after the cause of action has accrued.² Where the trans-

assessment on stockholders. A statute of limitations running from the time of dissolution of the company is not set running by corporate insolvency and cessation of business. *Sleeper v. Goodwin*, 67 Wis. 577 (1887). *Cf.* § 195, *supra*. The statute of limitations begins to run only from the time when the creditor's right to sue the stockholders begins. *McDonell v. Alabama, etc. Ins. Co.*, 85 Ala. 401 (1888); *Powell v. Oregonian R'y*, 38 Fed. Rep. 187 (1889). The statute of limitations runs from dissolution, even though judgment against the corporation is obtained subsequently. *Cottrell v. Manlove*, 49 Pac. Rep. 519 (Kan., 1897). As to the statute of limitations, see also 28 Am. L. Reg. 518.

¹*Green v. Beckman*, 59 Cal. 545 (1881); *Corning v. McCullough*, 1 N. Y. 47 (1847); *Wiles v. Suydam*, 64 N. Y. 173, 176 (1876); *Baker v. Atlas Bank*, 50 Mass. 182 (1845); *Commonwealth v. Cochituate Bank*, 85 Mass. 42 (1861); N. Y. Code Civ. Proc., § 382. The ten-years statute of limitations applies in Illinois on certificates of deposit or bank pass-books. *Palmer v. Woods*, 149 Ill. 146 (1894). The liability of an Illinois stockholder in a Kansas corporation for the debts of the corporation begins to run from the time he became a stockholder and expires in five years. *Hutchings v. Lampson*, 82 Fed. Rep. 960 (1897).

²See citations in the preceding note; also *Phillips v. Therasson*, 11 Hun, 141 (1877), holding that where by statute the capital must be paid in within two years upon pain of dissolution, and imposes liability upon stockholders for the debts of the cor-

poration until the capital is fully paid, the statute of limitations begins to run at the expiration of the two years allowed for paying the capital. Under the New York Manufacturing Act relative to the two-year statute of limitations to a stockholder's statutory liability, it begins to run upon the dissolution of the corporation. The creditor must sue within that time. *Hollingshead v. Woodward*, 107 N. Y. 96 (1887); *King v. Duncan*, 38 Hun, 461 (1886), holding that under that statute the creditor is not required to delay his suit until the two years has expired; *Knox v. Baldwin*, 80 N. Y. 610 (1880); *Hawkins v. Furnace Co.*, 40 Ohio St. 507 (1884). In South Carolina, under the statute of limitations of 1712 in that state, this action must be begun within four years. *Carrol v. Green*, 92 U. S. 509 (1875); *Terry v. McLure*, 103 U. S. 442 (1880). And, on the other extreme, in some of the older cases, it is held that an obligation, such as this, to pay money, arising under a statute, is a debt by specialty, and accordingly that it is barred only by a lapse of twenty years. *Bullard v. Bell*, 1 Mason, 243, 289 (1817, by Judge Story); S. C., 4 Fed. Cas. 625; *Thornton v. Lane*, 11 Ga. 459 (1852); *Lane v. Morris*, 10 Ga. 162 (1851). But see this view condemned in *Carrol v. Green*, 92 U. S. 509, 515 (1875), in an opinion by Justice Swayne, construing the South Carolina statute of 1712. *Cf.* *Green v. Beckman*, 59 Cal. 545 (1881), construing Cal. Code Civ. Proc., § 359; *Andrews v. Bacon*, 38 Fed. Rep. 777 (1889). Sometimes there is a provision that the action must

ferrer is liable for one year after a transfer, this liability applies only to debts created before the transfer. An action to enforce a liability against him may be brought within six years after the debt against the corporation matures.¹

If a statutory liability be held to be a penalty, then of course it will be held to come within that provision of the statute of limitations which provides for actions to enforce penalties.²

The statute of limitations ceases to run upon the filing of a judgment creditor's action, at least as against creditors who afterwards come into that suit.³

In general, whatever the statute be, it is the rule that a lapse of time sufficient to constitute a bar at law will in equity be given the same effect; in other words, in these cases there is

have been commenced by the creditor against the corporation within a given limited time after the maturity of the debt, in order to hold the shareholder on his statutory liability. *N. Y. Laws, 1848, ch. 40, § 24; Shellington v. Howland, 53 N. Y. 371 (1873); Birmingham Nat. Bank v. Mosser, 14 Hun, 605 (1878); Lindsley v. Simonds, 2 Abb. Pr. (N. S.) 69 (1866). Cf. State Sav. Assoc. v. Kellogg, 52 Mo. 583 (1873). See also Freeland v. McCullough, 1 Denio, 414, 422 (1845); Merchants' Bank v. Bliss, 21 How. Pr. 366 (1861); aff'd, 35 N. Y. 412 (1866); Lewis v. Ryder, 13 Abb. Pr. 1 (1861); Cuykendall v. Douglass, 19 Hun, 577 (1880); Moore v. Boyd, 74 Cal. 167 (1887). Frequently, also, there is a limitation applicable particularly to transfers of stock. Paine v. Stewart, 33 Conn. 516 (1882). In this case a statute of Minnesota imposing liability upon stockholders while they were such, and for one year thereafter, was held, in an action in Connecticut, not to be operative against one who had not been a stockholder for more than a year before the action was brought. In New York this limitation is two years. See Handy v. Draper, 89 N. Y. 334 (1882), and ch. XV, *infra*. See Schiffer v. Trustees, 87 Fed. Rep. 166 (1898).*

¹Harper v. Carroll, 62 Minn. 152 (1895).

²See § 223, *supra*. An action against a director in a national bank for violating the national bank act is in tort, being an action on the case, and the state statute of limitations applies. *Cockrill v. Butler*, 78 Fed. Rep. 679 (1897). Where the directors default for two successive years in filing a required report, a liability therefor on a claim existing before the first default arises the first year, and the statute runs against it from that time. *Colorado, etc. Co. v. Lenhart*, 6 Colo. App. 511 (1895).

³*Richmond v. Irons*, 121 U. S. 27 (1887); *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885); *Barrick v. Gifford*, 47 O. St. 180 (1890). Even though the receiver does not file a bill to enforce the statutory liability until more than six years after his appointment, yet the statute of limitations may not be a bar. *Andrews v. Bacon*, 38 Fed. Rep. 777 (1889). The state statute of limitations runs against the stockholder's liability in a national bank from the day when the assessment levied by the comptroller becomes payable, and this statute is a bar both in law and in equity. *Thompson v. German Ins. Co.*, 76 Fed. Rep. 892 (1896).

the same statute of limitations both at law and in equity.¹ The legislature cannot, after a statutory liability has been incurred, extend the period of the statute of limitations applicable to it.²

Other defenses.—The cause of action against a stockholder, arising from his statutory liability, is not defeated by his death. The action may proceed against his estate.³ The liability of solvent stockholders is not extended beyond the limit fixed by statute, even though other stockholders are insolvent.⁴ A petition in bankruptcy by a stockholder is no bar to the enforcement of his liability, unless the corporate creditor was a party to the bankruptcy proceeding.⁵ The admissions of one stockholder cannot bind another stockholder herein.⁶ Various other defenses are considered in the notes below.⁷

¹ *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473 (1840); *Carrol v. Green*, 92 U. S. 509 (1875); *Baker v. Atlas Bank*, 50 Mass. 182 (1845); *Lindsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 97 (1842); *Van Hook v. Whitlock*, 3 Paige, 409 (1832); *Commonwealth v. Cochituate Bank*, 85 Mass. 42 (1861); *Terry v. McLure*, 103 U. S. 442 (1880). When the statute prescribes the limitation, there is of course no controversy. *Baker v. Backus*, 32 Ill. 79 (1863). Laches is no defense. *Sadler v. Nicholson*, 26 S. E. Rep. 893 (S. C., 1897).

² *Close v. Potter*, 49 N. E. Rep. 686 (N. Y., 1898).

³ *Richmond v. Irons*, 121 U. S. 27 (1887); *Chase v. Lord*, 77 N. Y. 1 (1879). But see *Dane v. Dane Mfg. Co.*, 80 Mass. 488 (1860). A statutory liability in reference to illegal dividends may not survive the death of a director who is liable. *Boston, etc. R. R. v. Graves*, 80 Fed. Rep. 588 (1897).

⁴ *Crease v. Babcock*, 51 Mass. 525 (1846). See also, under the National Bank Act, *United States v. Knox*, 102 U. S. 422 (1880).

⁵ *Birmingham Nat. Bank v. Mosser*, 14 Hun, 605 (1878).

⁶ *Simmons v. Sisson*, 26 N. Y. 264 (1863).

⁷ The court will not authorize the

receiver of a national bank to compromise with the stockholders on their liability, even though more can be realized thereby, the stockholders having fraudulently conveyed away their property in order to avoid liability. *Re California Nat. Bank*, 53 Fed. Rep. 38 (1892). Stockholders cannot set up that their corporation was not authorized by law. *McDonnell v. Alabama, etc. Ins. Co.*, 85 Ala. 401 (1888); *National Com. Bank v. McDonnell*, 92 Ala. 387 (1891). The defendant cannot set up that he intended his subscription as a gift, where he received and retained the certificate. *McDowall v. Sheehan*, 13 N. Y. Supp. 386 (1891) (reversed on another point, 129 N. Y. 200). It is no defense that the corporation had committed an *ultra vires* act in buying out another corporation; nor that other stockholders had not paid for their stock in full, such unpaid portion being insufficient to pay the debts; nor that no certificates of stock had been issued. *Mitchell v. Beckman*, 64 Cal. 117 (1888). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences business be-

§ 226. *Priority among creditors.*—When the creditor is entitled to an action at law against an individual shareholder for an enforcement of a statutory liability, in order to collect a claim against the corporation, it has been held that the creditor first suing any shareholder is entitled to priority in enforcing his claim as against that particular shareholder. The diligent creditor is entitled to the payment of his claim, although other creditors are thereby deprived of payment.¹ The right to a priority, however, in these cases, is in general one of questionable propriety, and the courts are not inclined to favor it.² And one creditor may, at the instance of the rest,

fore one-half of its capital is subscribed and twenty per cent is paid in, they are not liable on such a contract. *Buffington v. Bardon*, 80 Wis. 635 (1891). Under the California statute it seems that a mere subscriber for stock is not liable where he did not fulfill the subscription. *Bank of Yolo v. Weaver*, 31 Pac. Rep. 160 (Cal., 1892). A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made and was fraudulently made, in that the directors issued it to themselves without paying therefor. *Latimer v. Bard*, 76 Fed. Rep. 536 (1896). Increased capital stock is legal, although it was issued to a person who was treasurer of a city and paid for the stock out of the city funds, the corporation not knowing thereof. *Olson v. State Bank*, 69 N. W. Rep. 904 (Minn., 1897). It is no defense that the stockholder was fraudulently induced by another party to purchase his stock from that party. *Olson v. State Bank*, 69 N. W. Rep. 904 (Minn., 1897). Where the judgment against stockholders on their statutory liability states the amount of stock held by each, the enforcement of such judgment cannot be carried out so as to impose upon any stockholder more than on the amount of stock held by him as speci-

fied in such judgment. *Baltimore, etc. R. R. v. Smith*, 44 N. E. Rep. 240 (Ohio, 1896). Fraud in the purchase of the stock is no defense. See § 261, *infra*. A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. *Donnelly v. Pancoast*, 15 N. Y. App. Div. 323 (1897). In assessing stock to raise a fixed amount of money, no assessment is levied upon stock held by the corporation itself. *Western Imp. Co. v. Des Moines Nat. Bank*, 72 N. W. Rep. 657 (Iowa, 1897).

¹ *Cole v. Butler*, 43 Me. 401 (1857), holding, also, that the rights of a creditor who moves first cannot be affected by the fact that another creditor, pursuing a shorter remedy, obtains judgment before him; *Ingalls v. Cole*, 47 Me. 530, 541 (1860); *Jones v. Wiltberger*, 42 Ga. 575 (1871); *Robinson v. Bank of Darien*, 18 Ga. 65, 108 (1855); *Thebus v. Smiley*, 110 Ill. 316 (1884). *Cf.* *Weeks v. Love*, 50 N. Y. 568 (1872); *Miers v. Zanesville, etc. Turnp. Co.*, 13 Ohio, 197 (1844). See also § 225 (b), *supra*.

² *Wright v. McCormack*, 17 Ohio St. 86 (1866), holding that, if part of the creditors institute an action to enforce the liability of all, no creditor can acquire priority or institute a separate suit on his own behalf;

be restrained from the prosecution of his individual suit where it is in prejudice of the equal rights of all the others.¹

§§ 227-229. *Contribution among shareholders*.—Upon general principles of equity, where a shareholder has been held liable, under the provisions of a statute, for a debt of the corporation of which he is a member, he may maintain an action against his co-shareholders for contribution.² Where the stock-

Smith v. Huckabee, 53 Ala. 191 (1875); Chicago v. Hall, 103 Ill. 342 (1882), holding that if a suit at law by a creditor against a stockholder be enjoined by other creditors who seek to enforce the liability for the benefit of all the creditors, and the stockholders discharge their liability, the creditor so enjoined has no prior lien upon the fund.

¹ Eames v. Doris, 102 Ill. 350 (1882); Pfohl v. Simpson, 74 N. Y. 137 (1878). Cf. Garrison v. Howe, 17 N. Y. 458 (1858).

² Aspinwall v. Sacchi, 57 N. Y. 331 (1874); Stewart v. Lay, 45 Iowa, 604 (1877); Umsted v. Buskirk, 17 Ohio St. 113 (1866); Matthews v. Albert, 24 Md. 527 (1866); Hadley v. Russell, 40 N. H. 109, 112 (1860); Erickson v. Nesmith, 46 N. H. 371 (1866); Gray v. Coffin, 63 Mass. 192 (1852); Middletown Bank v. Magill, 5 Conn. 28, 61 (1823); Brinham v. Wellersburg Coal Co., 47 Pa. St. 43 (1864); Masters v. Rossie Lead Min. Co., 2 Sandf. Ch. 301 (1845); Farrow v. Bivings, 13 Rich. Eq. (S. C.) 25 (1866); Clark v. Myers, 11 Hun, 608 (1877), holding that the action cannot be against one only; O'Reilly v. Bard, 105 Pa. St. 569 (1884), holding that a stockholder who pays a judgment against the corporation is confined to the remedy provided in the act, and in this case could not maintain assumpsit for contribution against other stockholders who were not parties to the judgment. As to the Pennsylvania statutory method of obtaining contribution, see also Brinham v. Wellersburg Coal Co., 47 Pa. St. 43 (1864). Stockholders seek-

ing to enforce contribution from co-stockholder in foreign corporation must show that he, the plaintiff, is legally liable. Eastman v. Crosby, 90 Mass. 206 (1864). See also Ladd v. Cartwright, 7 Oreg. 329 (1879); Patterson v. Lynde, 106 U. S. 519 (1882). A shareholder, it is said, being also a creditor of the corporation, may make use of whatever advantage his position as shareholder gives him to secure the payment of his claim, even to the exclusion of other creditors who are not shareholders. Whitwell v. Warner, 20 Vt. 425, 444 (1848); Reichwald v. Commercial Hotel Co., 106 Ill. 439 (1883), holding that the securing of a large debt to a stockholder for money advanced, by means of a deed of real property, with agreement that it should be considered security, was not fraudulent. See also Bristol Milling, etc. Co. v. Probasco, 64 Ind. 406 (1878); Terry v. Bank of Cape Fear, 20 Fed. Rep. 777 (1884). See also § 226, *supra*, to the effect that a stockholder sued at law may enjoin the suit and bring all parties into a suit in equity. Officer paying statutory liability may have contribution. Nickerson v. Wheeler, 118 Mass. 295 (1875). Cf. Ray v. Powers, 134 Mass. 22 (1883); Hartman v. Valley Ins. Co., 32 Gratt. (Va.) 242 (1879); Chandler v. Brown, 77 Ill. 333 (1875); Bronson v. Wilmington, etc. Ins. Co., 85 N. C. 411 (1881); Perry v. Turner, 55 Mo. 418 (1874). A stockholder and director who pays his liability under the California statute may have contribution from other stockholders. Redington v. Cornwell, 90 Cal. 49

holders' statutory liability is enforced by a suit in equity, contribution is of course enforced, in that suit, so far as the parties can be found within the jurisdiction.¹ Where the constitution of an unincorporated association limits the debts, and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders.² In assessing stock to raise a fixed amount of money, no assessment is levied upon stock held by the corporation itself.³

(1891). A stockholder who has been compelled to pay a statutory liability may have contribution from other stockholders. But where he pays before the creditor obtained judgment against the company, then, in order to obtain contribution, he must show that the company was insolvent and had no assets. *Ewing v. Stultz*, 9 Ind. App. 1 (1894). The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others. *Richter v. Henningsan*, 110 Cal. 530 (1895); *Wolters v. Henningsan*, 114 Cal. 433 (1896). Where the vendors of stock guarantee that the stock shall be non-assessable until they have advanced \$30,000, a stockholder

who is held liable on a statutory liability may hold the guarantors liable if they have not paid the \$30,000. *Omo v. Bernart*, 65 N. W. Rep. 622 (Mich., 1895).

¹ *Harpold v. Stobart*, 46 Ohio St. 397 (1889). In *Guerney v. Moore*, 131 Mo. 650 (1895); it was held that a stockholder who has paid more than his debt need not file a bill for contribution, but may pursue any or all of the remedies that are open to the other creditors. Contribution may be enforced in the suit in equity by which the liability is enforced. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896).

² *McFadden v. Leeka*, 48 Ohio St. 513 (1891).

³ *Western Imp. Co. v. Des Moines Nat. Bank*, 72 N. W. Rep. 657 (Iowa, 1897).

CHAPTER XIII.

LIABILITY OF STOCKHOLDERS WHERE THE SUPPOSED INCORPORATION DOES NOT PROTECT THEM, AND FOR ASSESSMENTS BEYOND THE PAR VALUE OF THE STOCK.

<p>§ 230. Different liabilities of a stockholder.</p> <p>231-234. Liability as partners by reason of deficient incorporation.</p> <p>235. Extent of the liability.</p> <p>236. Liability as partners by reason of unauthorized incorporation.</p>	<p>§§ 237-240. Liability as partners by reason of the fact that the corporation is incorporated in one state but does all its business in another state.</p> <p>241, 242. Assessments in excess of par value of stock.</p> <p>243. Miscellaneous cases of liability.</p>
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§ 230. *Different liabilities of a stockholder on his stock.*—A stockholder may be said to be liable on his stock in three different ways. First, he is liable to the corporation and corporate creditors until the full par value of his stock has been paid.¹ Second, he may have an additional liability imposed upon him by statute.² Third, it may happen that by some accident, mistake, or neglect the supposed corporation was never duly incorporated, or for some other reason the members become liable as partners in a copartnership; or it may be within the power of the corporation to assess the stockholder for sums over and above and in addition to the par value of the stock. This third kind of liability is unusual in its character, and is the subject of this chapter.

§ 231. *Liability as partners by reason of material defects in becoming incorporated.*—The statutes under which incorporations are generally made provide that a corporation may be formed by taking certain steps, usually the making and filing with the state, and also with the local authorities, a certificate signed by the incorporators, and containing a statement of the business, of the capital stock, and other facts material to the organization of the corporation.

Occasionally, however, it happens that this certificate is not fully made out, as required by the statute, or is not filed, or

¹ See chs. XI and III, *supra*.

² See ch. XII, *supra*.

some other step prescribed by law is not complied with. The corporation is then not duly incorporated; and the state, by *quo warranto*, may oust it from its user of corporate franchises. But it is a very different and difficult question to determine whether a private individual may take advantage of such facts, and claim that the supposed corporation is not a corporation, but only a partnership.

§ 232. *Who may question the regularity of acts in becoming incorporated.*—As already explained,¹ a subscriber for stock in a corporation cannot, when sued for calls on his stock, set up that the corporation was not duly incorporated.² He is estopped from so doing. Nor can a stockholder, who has funds of the corporation in his hands, defeat an action by the corporation therefor by setting up that the corporation was not duly incorporated.³ And, in general, a party contracting to pay money to a corporation, or to transfer property to it as a corporation, cannot avoid the obligation of that contract by alleging the fact that the corporation was not duly incorporated, provided that such corporations were allowed by law.⁴ The corporation itself cannot set up the defense that it was irregularly incorporated,⁵ nor can a foreign corporation.⁶ A corporation is not allowed to avoid its contracts on such grounds.⁷ The question of who may attack the legality of the organization of a corporation arises often where a corporation sues upon a note or other obligation, or brings suit to foreclose a mortgage or has suit brought against it on its notes, or for a foreclosure. In such cases the established rule is that the legality of the corporation cannot be called in question.⁸

§ 233. *Corporate creditors cannot hold stockholders liable as partners by reason of irregularities, mistakes, or omissions in the incorporation of a de facto corporation.*—There are many cases to the effect that a corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming

¹ See §§ 183-186, *supra*.

⁵ See § 637, *infra*.

² Buffalo, etc. R. R. v. Carey, 26 N. Y. 75 (1862).

⁶ Liter v. Ozokerite Min. Co., 7 Utah, 487 (1891).

³ See Krutz v. Paola Town Co., 20 Kan. 397 (1878). See also § 637, *infra*.

⁷ See § 637, *infra*.

⁸ See § 637, *infra*.

⁴ See § 637, *infra*.

incorporated was not complied with by the company in question. For instance, it has been held that where the articles of association were signed, but not filed until some time subsequently, debts contracted in the interim might be collected from the stockholders as partners.¹ So, also, a total failure to file or record the certificate or articles of incorporation has been held to render the members liable as partners;² as also an omission

¹ *Bigelow v. Gregory*, 73 Ill. 197 (1874); *McVicker v. Cone*, 21 Oreg. 353 (1891). See also *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238 (1886). *Contra*, *Whitney v. Wyman*, 101 U. S. 392 (1879); *Corey v. Morrill*, 61 Vt. 598 (1889).

² *Field v. Cooks*, 16 La. Ann. 153 (1861); *Abbott v. Omaha Smelting Co.*, 4 Neb. 416 (1876); *Garnett v. Richardson*, 35 Ark. 144 (1879); *Ferris v. Thaw*, 72 Mo. 446 (1880); *Coleman v. Coleman*, 78 Ind. 344 (1881); *Martin v. Fewell*, 79 Mo. 401, 410 (1888). Failure to record the certificate in the county recorder's office as required by statute renders the stockholders liable as partners, even to persons who did not know of the incorporation. Such persons are not given notice by the fact that their note was signed by the company by a certain person as treasurer. *New York, etc. Bank v. Crowell*, 177 Pa. St. 313 (1896). Failure to file the certificate of organization with the county recorder, as required by statute, is fatal, even though the charter has been issued by the state. The stockholders are liable as partners to one who did work, even though after the work was finished he took a corporate note therefor. *Guckert v. Hacke*, 159 Pa. St. 303 (1893). A creditor who seeks to hold stockholders liable as partners on the ground that no corporation exists must prove that the apparent corporation is not a corporation. He must prove the manner of organization by means of the partnership agreement, or whatever agreement exists, or that the concern

held itself out as a partnership. *Re Gibb's Estate*, 157 Pa. St. 59 (1893). Failure in the articles to state the number of shares taken, and failure to publish as required by statute, render the stockholders liable as partners. *Williams v. Hewitt*, 47 La. Ann. 1076 (1895). In *Hurt v. Salisbury*, 55 Mo. 310 (1874), corporate officers were held personally liable on a promissory note signed by them as officers, where the certificate was not filed as required. In *Richardson v. Pitts*, 71 Mo. 128 (1879), the same officers were held to be entitled to contribution from other members of the supposed corporation. *Cf. Blanchard v. Kaull*, 44 Cal. 440 (1872); *Western Union Tel. Co. v. Union Pacific R'y*, 3 Fed. Rep. 721, 729 (1880). In *Garnett v. Richardson*, 35 Ark. 144 (1879), the court held stockholders liable as partners until the certificate was filed with the secretary of state. *Cf. Harrod v. Hamer*, 32 Wis. 162 (1873), where the statute effected an incorporation without filing, but prohibited organization until after the articles were filed. The filing of the certificate in the county clerk's office, as required by statute, is essential to incorporation. *Childs v. Hurd*, 32 W. Va. 66 (1889). In *Bigelow v. Gregory*, 73 Ill. 197 (1874), the court held that there was no corporation until the certificate was filed, and that a creditor might recover from a stockholder as a partner. In *Indianapolis Furnace, etc. Co. v. Herkimer*, 46 Ind. 142 (1874), the court held that there was no corporation until the certificate was filed, and that a subscriber to the

of the members to sign and publish the articles of association;¹ or an indefinite statement of where the principal place of business of the corporation is to be.² In Iowa and Nebraska the statutory law makes the stockholders liable if the incorporation was irregular,³ while in Illinois the directors are made lia-

articles who had agreed to pay the corporation his dues when it was organized could successfully resist its suit until the certificate was filed. In *State v. Central, etc. Assoc.*, 29 Ohio St. 399 (1876), the court ousted an association whose notice of acceptance to the state was indefinite and ambiguous. Where the articles must be filed with the secretary of state and a fee paid in order to form a corporation, a transfer of property before this is done does not convey title to the corporation. The transferer's creditors may attach the property. *Jones v. Aspen Hardware Co.*, 21 Colo. 263 (1895). Failure to file a copy of the constitution of a society as required by statute renders the members liable personally, even though the articles of incorporation were filed. *Bergeron v. Hobbs*, 71 N. W. Rep. 1056 (Wis., 1897).

¹ *Unity Ins. Co. v. Cram*, 43 N. H. 636 (1862); *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104 (1881), where the articles were not properly signed and acknowledged. This case also disapproves the decision in *Humphreys v. Mooney*, 5 Colo. 282 (1880). In enforcing this partnership liability, the assumed corporation is not to be made a party defendant with the members thereof. *Smith v. Colorado F. Ins. Co.*, 14 Fed. Rep. 399 (1882).

² *Harris v. McGregor*, 29 Cal. 124 (1865). The fact that the party contracted with them under a corporate name is immaterial, since, at common law, parties may carry on business under any name they may choose. *Lauferty v. Wheeler*, 11 Abb. N. Cas. 223 (1882); *Lindley, Partn.*, *182. The case of *Chaffe v.*

Ludeling, 27 La. Ann. 607 (1875), says: "Obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. It matters not what they chose to call themselves." See also *National Union Bank v. Landon*, 45 N. Y. 410, 414 (1871); *Ridenour v. Mayo*, 40 Ohio St. 9 (1883). *Cf. Wentz v. Lowe*, 3 Atl. Rep. 878 (Pa., 1886). An individual may enforce a contract which he makes for himself but in the name "The National Associated Press, James H. Goodsell, President." *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430 (1892). Corporate creditors may attack the validity of the corporate organization. *Empire Mills v. Alston Grocery Co.*, 15 S. W. Rep. 505 (Tex., 1891). An insufficient statement in the papers to be filed as to the property which is turned in for stock renders the stockholders liable as partners. *Vanhorn v. Corcoran*, 127 Pa. St. 255 (1889).

³ In *Clegg v. Hamilton, etc. Co.*, 61 Iowa, 121 (1883), the court held that publishing the articles, which did not contain all the requirements of the statutory notice, was insufficient, and stockholders were liable as partners. In Iowa, stockholders are liable as partners, by statute, if the incorporation is not regular. *Eisfeld v. Kenworth*, 50 Iowa, 389 (1879). In *First Nat. Bank v. Davies*, 43 Iowa, 424 (1876), the court held that, where the state waived notice by permitting the filing to be made with its secretary within ninety days, vested rights accrued which would not be affected by failure to file within that time. See also *Jessup v. Carnegie*, 80

ble.¹ The mere assumption of corporate powers, without any attempt at incorporation, cannot, of course, exempt the mem-

N. Y. 441 (1880). Under the Iowa statutes the stockholders are liable as partners where the certificate of incorporation failed to state the highest amount of indebtedness which the company might incur. *Heuer v. Carmichael*, 82 Iowa, 288 (1891). Although the articles are not recorded as required by statute, yet as between themselves the parties are stockholders and not partners. *Heald v. Owen*, 79 Iowa, 23 (1890). Under the Iowa statutes an insufficient incorporation of the plaintiff foreign corporation is not put in issue by a denial of incorporation. The deficiency must be specifically alleged. *Wardner, etc. Co. v. Jack*, 82 Iowa, 435 (1891). In an action against individual stockholders to charge their property with a judgment rendered against the corporation, the plaintiff is not estopped to allege defects in its organization by reason of having recognized the corporation in dealing with it and in bringing suit against it as such. *Heuer v. Carmichael*, 82 Iowa, 288 (1891). Failure to complete the publication as required by statute does not render the stockholders liable under the Iowa statute to a creditor who entered into his contract before the time allowed for publication had expired. *Thornton v. Balcom*, 85 Iowa, 198 (1892). Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount, with the right to the stockholders to increase it up to the statutory limit. *Thornton v. Balcom*, 85 Iowa, 198 (1892). The fact that the whole capital stock is not subscribed is not a failure to comply with the law relative to organizations so as to render the stockholders liable as partners under the Iowa statute. *Sweney v. Talcott*, 85 Iowa, 103 (1892). Where

a *de facto* corporation incurs debts, and subsequently a new corporation, legally organized, takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147 (1895). Although the statute renders stockholders liable as partners unless there has been a substantial compliance with the statute relative to organization, yet the courts are not inclined to enforce such liability. *Porter v. Sherman, etc. Co.*, 36 Neb. 271 (1893). Failure to publish the charter as required by statute does not render the stockholders individually liable. *Kleckner v. Turk*, 45 Neb. 176 (1895). Failure to file the articles of incorporation with the secretary of state, and the fact that the debts exceed the amount specified in the charter, and failure to publish notice of the debts of the corporation as required by law, do not render the stockholders personally liable on notes which were given by the corporation in the corporate name, especially where judgment was first obtained against the corporation on the notes. *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109 (1896). A person contracting with a corporation as such cannot hold the stockholders personally liable on the ground that the company did not publish notice of its incorporation as required by statute, nor have its capital stock subscribed at a certain time nor paid for, and on the ground that it failed to post a copy of its by-laws and to make statements as required by statute, and to keep a record book or stock book. *Hogue v. Capital Nat. Bank*, 47 Neb. 929 (1896).

¹ Under the Illinois statute making directors liable for debts before the

bers from full liability as partners.¹ "And a mere feigned compliance with the laws of the state of which it is claimed a corporation is a citizen" is not sufficient; nor is the mere adoption of the corporate name sufficient.² Even though the stockholders are liable as partners because the articles were not properly acknowledged, the legislature may cure the defect and thus destroy any cause of action then existing.³

§ 234. During the past few years, however, the great weight of authority has clearly established the rule that, where a supposed corporation is doing business as a *de facto* corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company. The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under that law and is transacting business in a corporate name.⁴ This rule applies to claims based on tort the same as to those based on contract.⁵

It must be admitted that this conclusion of the law is reasonable and just. There is no reason why parties who have dealt

statute is complied with as to incorporation, and the issue, by the secretary of state, of a certificate of completed organization and recording of the same in the county where the principal office is, the directors are liable if such certificate is not so recorded. Liability may be enforced even by a corporate creditor who has filed his claim with an assignee of the corporation for the benefit of its creditors. *Loverin v. McLaughlin*, 161 Ill. 417 (1896).

¹ *Pettis v. Atkins*, 60 Ill. 454 (1871); *Fuller v. Rowe*, 57 N. Y. 23 (1874).

² *Owen v. Shepard*, 59 Fed. Rep. 746 (1894), holding that, where the stockholders are sued as individuals for the debts of the company, it is for them to prove that the corporation existed. The testimony of two persons that they complied with the laws and got a charter is insufficient, it appearing that the law required at least three incorporators. The

charter itself is the best evidence. Persons transacting business without incorporation are liable as partners even though they do so in the name of a corporation which has assigned all its property to them. *Forbes v. Whittemore*, 62 Ark. 229 (1896). Where no effort has been made to incorporate, all are liable as partners. *McLennan v. Hopkins*, 2 Kan. App. 260 (1895), a case where it was supposed by all that a corporation existed. Where no certificate is filed with the secretary of state, no stock issued, no record book, and no real effort to perfect a corporation, the members are liable individually. *Queen, etc. Co. v. Crawford*, 127 Mo. 356 (1895).

³ *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123 (1894).

⁴ See cases in notes below; also § 185, *supra*, note.

⁵ *Demarest v. Flack*, 33 N. Y. St. Rep. 675; affirmed, 128 N. Y. 205 (1891).

with a corporation as a corporation should afterwards be allowed to claim more than they originally bargained for, and to hold the stockholders personally liable. Such a rule would be disastrous in the extreme. Under the rule subjecting stockholders to this unknown peril, the dangers to business were so great, the hardship to innocent parties so intolerable, and the risk of investing in corporate enterprises so increased, the courts gradually departed from the old decisions on this subject and wisely refused to hold the stockholders liable. The equities are against such liability, and recent cases have so settled the law beyond reasonable doubt.¹

¹ *Whitney v. Wyman*, 101 U. S. 392 (1879). The members of a supposed corporation are not liable individually on a loan of money made to it, even though it was irregularly incorporated. *Larned v. Beal*, 65 N. H. 184 (1889). "Where there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding." *Crowder v. Sullivan*, 128 Ind. 486 (1891). After a party has recovered judgment against a corporation, as such, and obtained the appointment of a receiver therefore, he cannot in the same suit deny its corporate entity, and seek to hold the stockholders thereof liable as partners. *First Nat. Bank v. Dovetail, etc. Co.*, 143 Ind. 534 (1896). Where a man has acted as director of a company he cannot afterwards sue the stockholders to hold them liable as partners on the ground that the certificate of organization was not filed for record as required by statute, and he cannot hold them liable, although the statute renders them liable where the provisions of the statute are not complied with. *Curtis v. Meeker*, 48 N. E. Rep. 399 (Ill., 1897). In the case of *Johnson v. Schulin*, 73 N. W. Rep. 147 (Minn., 1897), the court held that the individual defendants were not liable

as partners, although they were doing business under the name of "*Schulin, Linden, Lindberg, & Co.*," and although the articles of incorporation were signed by only five members, whereas the statute required seven, and although the certificate of incorporation was not recorded, although it was filed. It seems, however, that the plaintiffs knew that the defendants were acting as a corporation. Where the articles were filed with the county clerk on November 9, 1886, and goods were purchased of plaintiff soon after, and the articles were not filed with the secretary of state until August 17, 1887, the plaintiff cannot ignore the corporation and hold the parties liable as partners. The plaintiff made the contract supposing he was dealing with a corporation. *Vanneman v. Young*, 52 N. J. L. 403 (1890). Where the statute authorizes seven or more "persons" to incorporate a railroad company, the word "persons" does not require the incorporators to be residents. The incorporation is legal although three of the seven incorporators are non-residents. *Central R. R. v. Pennsylvania R. R.*, 31 N. J. Eq. 475 (1879). Under the Colorado statute requiring the certificate to set forth by whom the corporate affairs shall be conducted, a provision that they shall be conducted by the

In England the remarkable conclusion was reached in the lower courts that where the owner of a business incorporates a company for the purpose of carrying on the business, the in-

president, vice-president, and attorney, instead of providing for directors, is insufficient. The corporation is only *de facto*, but an incorporator and a vendor of property to it cannot question the incorporation. *Bates v. Wilson*, 14 Colo. 140 (1890). Though the provision in the Kentucky statutes requiring publication of the charter is not complied with, yet the corporation is valid and complete, except that the state may proceed to annul the charter. No other party can raise the objection. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890) (reversed on other grounds, 139 U. S. 417); *Walton v. Riley*, 85 Ky. 413, 421 (1887), overruling *Heinig v. Adams, etc. Mfg. Co.*, 81 Ky. 300 (1883). Failure to file the articles with the secretary of state is not fatal. *Portland, etc. Turnp. Co. v. Bobb*, 88 Ky. 226 (1889). Incorporators are not personally liable, even though they do not publish the articles as required by statute. *Clark v. Richardson*, 31 S. W. Rep. 878 (Ky., 1895). In proving incorporation it is not necessary to prove publication as required by statute. *Brown v. Corbin*, 40 Minn. 508 (1889). Although there are less stockholders and less directors than the statute or charter require, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890). The grantor of land cannot claim that the grantee was unincorporated and not qualified to hold land, the incorporation being only partially completed. *Reinhard v. Virginia, etc. Co.*, 107 Mo. 616 (1891). The failure to specify the term of existence is not fatal where the general act limits the time. *Albright v. Lafayette, etc. Assoc.*, 102 Pa. St. 411, 423 (1883);

Becket v. Uniontown, etc. Assoc., 88 Pa. St. 211 (1878).

In *Seacord v. Pendleton*, 55 Hun, 579 (1890), there was no pretense of any attempt to incorporate the bank and yet the stockholders were held not liable. See *S. C. sub nom. Merchants' Nat. Bank v. Pendleton*, 9 N. Y. Supp. 46 (1890). In *Christian v. Bowman*, 49 Minn. 99 (1892), where there was a failure to file the proper affidavit of publication, the directors were held personally liable for debts, but the court stated that if the case had been properly tried a different conclusion might have been reached. One who takes part in organizing the company cannot hold its members liable as partners on the ground that it was irregularly organized. *Allegheny Nat. Bank v. Bailey*, 147 Pa. St. 111 (1892). Nor can one to whom he assigns a leasehold. *Egbert v. Kimberly*, 146 Pa. St. 96 (1892). Where a creditor of a bank sues the stockholders as partners, the burden of proof is on him to prove that no corporation existed, it being shown that the bank always acted as a corporation and held itself out as such and was supposed so to be by the stockholders. *Hallstead v. Coleman*, 143 Pa. St. 352 (1891). A failure to record the articles with the local register's office, as required by statute, does not render the stockholders personally liable. *Pierce v. Hacke*, 1 Pa. Dist. Rep. 517 (1892). Although a majority of the incorporators assume to be residents, but are not, and the charter is forfeited, yet stockholders who become such after incorporation and without knowledge of the fraud cannot be held liable as partners. *American Salt Co. v. Heidenheimer*, 80 Tex. 344 (1891). A stockholder cannot sustain a bill in equity to

corporators being merely the nominees of the owner of the business which is to be sold to the corporation, and the business being transferred to the corporation in payment for its

have the *de facto* going corporation wound up as a partnership by proving that the articles were not filed in the office of the recorder of deeds for the county, nor by proof that his subscription was not in good faith. "The general rule is that one who deals with a corporation as existing *de facto* is estopped to deny that, as against it, it has been legally organized." *Bushnell v. Consolidated, etc. Co.*, 138 Ill. 67 (1891). A failure to organize does not render the stockholders liable as partners, business having been carried on without organization after the filing of the papers. *Cory v. Lee*, 93 Ala. 468 (1891). The failure to insert in the certificate a provision as to the residences of the persons does not render the stockholders liable as partners. The defendant in this case alleged that it was a corporation *de facto*, and that plaintiff sold goods to and contracted with defendant as a corporation, knowing that it was doing business as such. The contract was made with it in its corporate name and capacity. *Snider's Sons Co. v. Troy*, 91 Ala. 224 (1890).

In Alabama the stockholders are not liable for the debts, merely because the articles of incorporation do not specify the instalments by which the unpaid capital stock shall be paid in. *Bolling v. Le Grand*, 87 Ala. 482 (1889). Where a corporation has been authorized by a judge as provided by statute, but no certificate has been issued, the corporation is sufficiently formed to defeat the plea of *nul tiel corporation*. *Sparks v. Woodstock, etc. Co.*, 87 Ala. 294 (1889). If proof is given by plaintiff that a copartnership existed and the defense is that it was a corporation, the defendant must prove that fact.

Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. *Clark v. Jones*, 87 Ala. 474 (1889). A failure to organize does not render the stockholders liable as partners, although business has been carried on without organization after the filing of the papers. *Cory v. Lee*, 93 Ala. 468 (1891). Failure to file the articles of association with the county clerk, as required by statute, does not render the stockholders liable as partners. *Granby, etc. Co. v. Richards*, 95 Mo. 106 (1888). A private citizen cannot contest the validity of a grant by a city to a water-works company. *Stedman v. City of Berlin*, 73 N. W. Rep. 57 (Wis., 1897). A person who contracts with a corporation, knowing that it claims to be a corporation and knowing that there was a stipulation for a limited liability, cannot hold the parties liable as partners. *Sentell v. Hewitt*, 22 S. Rep. 970 (La., 1898). Where the certificate or articles are to be filed both with the state and the local authorities, a failure as to the former does not render the stockholders liable as partners, provided the articles or certificate are filed with the local authorities. *Mokelumne Hill Min. Co. v. Woodbury*, 14 Cal. 424 (1859); *Raisbeck v. Oesterricher*, 4 Abb. N. Cas. 444 (1878); *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54 (1855). The creditor cannot sue the directors for damages for a fraudulent conspiracy herein, especially when he was informed that the corporation had been irregularly incorporated. *Nelson v. Luling*, 62 N. Y. 645 (1875). A statement of the location of the "place of business" is a sufficient statement of the "principal place of business." *Re Spring Valley Water-works*, 17

stock, the corporate entity will be disregarded in case of the insolvency of the corporation, and the party so selling his business to the corporation and carrying it on would be held per-

Cal. 132 (1860). That a failure to file the certificate with the secretary of state does not invalidate the corporation, see *Tarbell v. Page*, 24 Ill. 46 (1860). See, also, to same effect, *Planters', etc. Bank v. Padgett*, 69 Ga. 159 (1882); *Humphreys v. Mooney*, 5 Colo. 282 (1880); *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197 (1884); *Merriman v. Magiveny*, 12 Heisk. (Tenn.) 494 (1873); *Merchants', etc. Bank v. Stone*, 38 Mich. 779 (1878); *Jessup v. Carnegie*, 80 N. Y. 441 (1880), applying an Iowa decision to an Iowa case, *First Nat. Bank v. Davies*, 43 Iowa, 424 (1876). In *Holmes v. Gilliland*, 41 Barb. 568 (1864), the court held that failure to give notice to the community by publication does not make the stockholders partners. In *De Witt v. Hastings*, 69 N. Y. 518 (1877), where no certificate was filed owing to an abandonment of the enterprise, it was held that a subsequent filing of it could not render liable one of the original promoters who took no part in the filing of the articles of association, although his name was attached thereto. In *People v. Selfridge*, 52 Cal. 331 (1877), an action was brought on the ground that the certificate filed did not show, as required, that a majority of the stockholders were present at the meeting to organize. The defendant offered to prove that a majority were in fact present, but the court refused to receive the evidence and rendered judgment of ouster. Such facts, however, are no defense to subscriptions. See §§ 183-186, *supra*, and § 637, *infra*. See also ch. XLI, relative to foreign corporations.

A failure to notify each member of the meeting to organize is immaterial. *McClinch v. Sturgis*, 72 Me. 288 (1881). See also *Judah v. America,*

etc. Co., 4 Ind. 333 (1853); *Russell v. McLellan*, 31 Mass. 63 (1833); *Newcomb v. Reed*, 94 Mass. 362 (1866). A failure to give the statutory notice of the first meeting is immaterial where all but one stockholder was present and he afterwards ratified all that was done. *Babbitt v. East, etc. Co.* (N. J., 1876), *Stew. Dig.*, p. 208, § 13. See also §§ 590, 593, 599, *infra*. The omission of an immaterial part of the acknowledgment by an incorporator, and the omission of a certificate of notaryship, do not render the incorporators liable as partners. *Stout v. Zulick*, 48 N. J. L. 599 (1886). An incorporator may sign by making his mark. *Board, etc. Church v. Campbell*, 48 La. Ann. 1543 (1896). An infant cannot be an incorporator. *Hamilton, etc. Co. v. Townsend*, 13 Ont. App. Rep. (Can.) 534 (1886). A failure to commence the principal business does not invalidate the incorporation. *Trowbridge v. Scudder*, 65 Mass. 83 (1853). Nor does an *ultra vires* act or fraud of the corporation have that effect. *Langan v. Iowa, etc. Constr. Co.*, 49 Iowa, 317 (1878); *Second Nat. Bank v. Hall*, 35 Ohio St. 158 (1878). Where, however, an incorporated society used all its funds to contest a debt, the court compelled the members to replace the money so used. *Bigelow v. Congregational Soc.*, 11 Vt. 283 (1839). In the case of *Medill v. Collier*, 16 Ohio St. 599, 613 (1866), the court said: "Where the entire business carried on by persons in the name of a corporation is such as the corporation is prohibited by law from doing, they cannot interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of the corporate name."

sonally responsible for all the debts of the corporation, on the theory that the corporation was merely his agent. This decision was severely criticised, and an appeal was taken to the

Where the articles of incorporation are signed and filed, but no organization is ever had, a part of the subscribers are not liable for debts contracted in the corporate name by another party. *Rutherford v. Hill*, 22 *Oreg.* 218 (1892). Although the corporation is apparently abandoned and an agreement as to contributions is signed, yet the courts are inclined to hold that the business is still that of the corporation. *Rio Grande Cattle Co. v. Burns*, 82 *Tex.* 50 (1891). Stockholders cannot be held liable as partners on the ground of illegal incorporation, where there is a law authorizing incorporation for that purpose, and an attempt was made to organize thereunder, and there was user. *Finnegan v. Noerenberg*, 52 *Minn.* 239 (1893). Although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners. *Demarest v. Flack*, 128 *N. Y.* 205 (1891). Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce. *Brain-tree, etc. Co. v. Braintree*, 146 *Mass.* 482 (1881). The fact that a corporation has not filed its certificate of incorporation in the proper county clerk's office does not prevent its bringing suit, its certificate having been properly filed with the secretary of state. *Young, etc. Co. v. Young, etc. Co.*, 72 *Fed. Rep.* 62 (1896). Failure to insert in the articles of incorporation the number of shares taken by each does not render the stockholders liable. *Wilson Cotton Mills v. C. C. Randleman, etc. Mills*, 115 *N. C.* 475 (1894). A creditor cannot maintain a bill for accounting against persons as copartners, where a corporation was doing the business, even though the books were kept as though they were partners. *Nightingale v. Milwaukee Furn. Co.*, 71 *Fed. Rep.* 234 (1895). Irregularities in the organization of a New Jersey corporation cannot be inquired into in the courts of another state, a charter having been issued to the company in the state where it was organized. *Lancaster v. Amsterdam Imp. Co.*, 140 *N. Y.* 576 (1894). A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant. *Lamming v. Galusha*, 81 *Hun.* 247 (1894), where it was also claimed that the incorporation had been insufficient. For a detailed digest of the decisions on what may and what must be stated in certificates of incorporation, and what informalities will be fatal, and what meaning is given to the usual provisions of general statutes for incorporation, see '12 *Am. R. R. & Corp. Cases*, pp. 474-522. The assignee of a corporation cannot sue its incorporators for ten per cent of the capital stock, on the ground that they had sworn that ten per cent had been paid in in order to obtain the charter, when in fact it had not been paid in. *Patterson v. Franklin*, 176 *Pa. St.* 612 (1896). A creditor who deals with a corporation as a corporation cannot hold the stockholders liable as partners. *American, etc. Co. v. Bulkley*, 65 *N. W. Rep.* 291 (*Mich.*, 1895). A creditor who deals with a corporation as such cannot hold its stockholders liable as partners on the ground that its organization was a fraudulent device to obtain credit for a copartnership, especially in a

House of Lords, where the judgment of the lower courts was unanimously reversed.¹

§ 235. *Extent of the liability by reason of deficient incorporation.*—The mere fact that an attempted incorporation has failed does not necessarily render all the participants therein liable absolutely for the debts of the concern. At the most, each is liable only in case he would be liable if the original plan had been to form a partnership. If he was not a member when the debt was contracted, he cannot be held liable on that particular debt.² One case goes still further, and holds that one who becomes a member subsequently to the attempted incorporation, but takes no part in the organization or management of the company, cannot be held liable for its debts.³

§ 236. *Liability as partners by reason of fact that corporations cannot be organized for the business involved.*—The general incorporating acts common to most of the states usually specify the particular kinds of business for the prosecution of which corporations may be formed thereunder. It follows that no business can be carried on by persons, as a corporation, under the incorporating act, unless that particular business is specified therein. Many decisions on what kinds of business are included in the words used in various statutes of the different states are given in the notes below.⁴

suit for the foreclosure of a corporate mortgage. *Gow v. Collin, etc. Co.*, 66 N. W. Rep. 676 (Mich., 1896).

¹*Salomon v. Salomon, etc. Co.*, [1897] A. C. 22, rev'g *Broderip v. Salomon, etc. Co.*, [1895] 2 Ch. 323. See also *Munkittrick v. Perryman*, 74 L. T. Rep. 149 (1896), where the court held that two partners might incorporate and that they would not thereafter be personally liable on the contracts of the company. The court, however, intimated that if both of the partners and the corporation had been before the court a different conclusion might have been reached.

²*Fuller v. Rowe*, 57 N. Y. 23 (1874). See also § 508, *infra*. In a suit against stockholders as partners, the defendants may require the joinder

of their associates. *De Witt v. Hastings*, 69 N. Y. 518 (1877).

³*Stafford Nat. Bank v. Palmer*, 47 Conn. 443 (1880). Cf. *Richardson v. Pitts*, 71 Mo. 128 (1879).

⁴Thus, where a rifle club attempted incorporation under the statute allowing incorporation for "literary, scientific, and charitable purposes," the members were held individually liable for damages to the widow of a man who was killed by a bear which the club was keeping. *Vredenburg v. Behan*, 33 La. Ann. 627 (1881). See also *Glen v. Breard*, 35 La. Ann. 875 (1883). Many business purposes may be specified in one charter. *Bird v. Daggett*, 97 Mass. 494 (1867). "Any other lawful purpose" does not include mutual contribution and aid, and the encouragement of frugality,

If a general incorporating act is unconstitutional, all supposed corporations formed thereunder are merely partnerships and

etc. *State v. International Inv. Co.*, 88 Wis. 512 (1894). Where the charter authorizes incorporation to improve and sell lands, a company may be organized to buy, sell, and improve land. *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576 (1894). Where corporations may be formed for any legal purpose they may be formed to buy and sell stocks or land. *Market St. R'y v. Hellman*, 109 Cal. 571 (1895). A bank cannot incorporate under act for "any species of trade or commerce." *Bank of California v. Collins*, 7 Hun, 336 (1876). A purchaser of stock from one of the supposed stockholders cannot recover back the purchase price from all of such stockholders. His remedy is other than this. *Perry v. Hale*, 143 Mass. 540 (1887). Several objects may be included in the same articles of incorporation. *West v. Crawford*, 80 Cal. 19 (1889). Where the charter requires a statement of the limit of debts not exceeding two-thirds of the capital stock, it suffices to state that the debt shall not exceed such two-thirds. *Park v. Zwart*, 92 Iowa, 37 (1894). The articles of incorporation are legal even though the subscribers designate their Christian names by initials instead of full name. *State v. Beck*, 81 Ind. 500 (1882). Where the statute authorizes incorporation by "any number of persons," one alone cannot organize a company. *Louisville Bkg. Co. v. Eisenman*, 94 Ky. 83 (1893). Where the statute requires the charter to state the initial terminus and the end of the terminus, and general route, the charter cannot definitely describe one route and conclude with a general statement that it covers "all the streets of the city, then or thereafter to be established." *Mayor, etc. v. Africa*, 77 Fed. Rep. 501 (1896). An application

for a charter for "the mining for and manufacturing of oil and gas" is too general and indefinite to be granted. An application should express singleness of purpose, but two pursuits may be combined when kindred and cognate. *Op. Atty. Gen., Re Newton Hamilton Oil, etc. Co.*, 10 Pa. Co. Ct. Rep. 452. See § 4. A mercantile business may be incorporated under a statute authorizing the incorporation of "industrial business." *Bashford, etc. Co. v. Agua, etc. Co.*, 35 Pac. Rep. 983 (Ariz., 1894). If a charter contains purposes, some of which are legal and some illegal, it is good to the extent of the former. *Galveston Land & Imp. Co. v. Perkins*, 26 S. W. Rep. 256 (Tex., 1894). It is no defense to a subscription for stock as against a receiver that the real object of the corporation was to promote selling pools on horse racing and gambling. *Augir v. Ryan*, 63 Minn. 373 (1896). Under the words "or other lawful business," in the general incorporating statute, a company may be organized to buy and sell real estate. *Brown v. Corbin*, 40 Minn. 508 (1889). Indefiniteness in the statement of the objects of incorporation is no defense. *Owenton, etc. Turnp. Co. v. Smith*, 13 S. W. Rep. 426 (Ky., 1890). A company may incorporate to buy, sell, and deal "in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission, in the United States and elsewhere," under the Texas statute authorizing incorporation for purposes of "mutual profit or benefit." *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). A constitutional prohibition against the incorporation of any church does not prevent the incorporation of the "General Assembly of the Presby-

the members are liable as partners.¹ If the business itself, for which a corporation is attempted, is illegal, the charter is no protection.² Frequently certain kinds of business are not mentioned in the act, for the reason that it is not deemed wise pub-

terian Church in the United States." *Guthrie v. Guthrie*, 10 S. E. Rep. 327 (Va., 1889). A corporation organized for mining and trading cannot do business under an act for mining. *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162 (1889). A medical college cannot be incorporated under an act to incorporate benevolent, charitable, scientific, and missionary societies. *People v. Gunn*, 96 N. Y. 317 (1884). A mutual reliance society cannot be incorporated under an act for incorporating benevolent, charitable, scientific, and missionary societies. *People v. Nelson*, 46 N. Y. 477 (1871). A trust company is not a bank within the meaning of a criminal statute. *State v. Reid*, 125 Mo. 43 (1894). Where the general act authorizes incorporation for manufacturing gas "or" manufacturing electricity, a company may be organized for both of these purposes. *People v. Rice*, 138 N. Y. 151 (1893). Express business is an "industrial pursuit," as used in the federal statute allowing incorporation in territories. *Wells, etc. Co. v. Northern Pac. R'y*, 23 Fed. Rep. 469 (1881). A mercantile enterprise may be incorporated under an act authorizing incorporation for any "industrial or productive interest." *Carver Merc. Co. v. Hulme*, 7 Mont. 566 (1888). An elevator company cannot incorporate under a manufacturing company act. *Mohr v. Minnesota Elev. Co.*, 40 Minn. 343 (1889). Printing and publishing a newspaper is not a manufacturing business. *Press Printing Co. v. State Board of Assessors*, 51 N. J. L. 75 (1888). Under an act authorizing incorporations for "trade," an incorporation for buying and selling land is

sustained. *Finnegan v. Noerenberg*, 52 Minn. 239 (1893).

¹ *Eaton v. Walker*, 76 Mich. 579 (1889). There may be a question as to the validity of the law itself allowing the incorporation. *Williams v. Bank of Michigan*, 7 Wend. 539 (1831); *State v. How*, 1 Mich. 512 (1846); *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 190 (1880). As to a corporation incorporated by a state, as a state, before it was admitted to the Union, see *Mayers v. Manhattan Bank*, 20 Ohio, 283 (1851). Persons acting as agents for a corporation which does not exist are personally liable, even though they acted in good faith. *Lagrone v. Timmerman*, 46 S. C. 372 (1895), a case where one corporation undertook to grant a charter to another corporation. *Contra*, *Scott v. Detroit, etc. Soc.*, 1 Doug. (Mich.) 119 (1843). A stockholder who has given a mortgage to the corporation cannot defeat the same on the ground that the charter was unconstitutional. *Building, etc. Assoc. v. Chamberlain*, 4 S. D. 271 (1893).

² Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without consideration and void. *Clemshire v. Boone County Bank*, 53 Ark. 512 (1890). Where a scheme involving a lapse of membership and rights is organized under the act authorizing the organization of benevolent and charitable institutions, a court of equity will enjoin the continuance of business and will wind it up, the officers being guilty of illegal conduct. *Peltz v. Supreme, etc. Union*, 19 Atl. Rep. 668 (1890). Where a com-

lic policy to allow a limited liability in that class of business, such as construction companies for the building of railroads.¹ Accordingly, where the business for which incorporation is sought is not within the classes of business mentioned in the act itself, the attempted incorporation is void and the participants are liable as copartners.

pany is organized for an illegal purpose, *i. e.*, a lottery, and its capital stock is issued without consideration, a person buying stock with notice of the facts cannot maintain a bill for an injunction against the issue of preferred stock and for a receiver. *Le Warne v. Meyer*, 38 Fed. Rep. 191 (1889). The organization of a company to carry on the lottery business in foreign countries was held legal in *Macnee v. Persian Inv. Corp.*, L. R. 44 Ch. D. 306 (1890). *Cf. Le Warne v. Meyer*, 38 Fed. Rep. 191 (1889). The secretary of state will not be compelled to accept articles of incorporation for bookmaking,—*i. e.*, gambling on races,—even though the statute legalizes and regulates race tracks. *Re New York Booking Co.*, N. Y. L. J., April 29, 1892. Under a statute authorizing incorporation “for pecuniary profit or gain,” persons may incorporate to issue bonds to be paid for by purchasers thereof in monthly instalments and to be redeemed as might be prescribed, and to sell and dispose of such bonds. *State v. Corkins*, 123 Mo. 56 (1894). The courts will refuse a charter to a company whose business is to be “to promote the business of such retail coal dealers as become members thereof, and to protect them.” etc., the intent being to combine the retail coal dealers. *Re Richmond, etc. Coal Co.*, 9 R’y & Corp. L. J. 31 (Phila., 1890). Persons incorporated for the purpose of doing a grain-gambling business have been held jointly and severally liable for money obtained from a customer. The corporate

character does not protect them. *McGrew v. City Produce Exchange*, 85 Tenn. 572 (1887). A subscriber who is sued by a receiver of the corporation on a subscription cannot set up the defense that the purpose of the corporation was illegal, in that it involved a drawing for distribution among the stockholders of lots of unequal value. *Cardwell v. Kelly*, 28 S. E. Rep. 953 (Va., 1898).

¹See Part VII, *infra*, concerning the statutes. It has been held, however, that, under the general act for the incorporation of companies for constructing and operating a railroad, a company for the construction alone of the road may be incorporated. “That there can be a railroad company which does nothing but construct the road, and a railroad company which does nothing but operate the constructed road, cannot be doubted. It is not essential to the idea of a railroad company that it should both construct and operate a railway.” *First Nat. Bank of Davenport v. Davies*, 43 Iowa, 424 (1876), followed in *Jessup v. Carnegie*, 80 N. Y. 441 (1880); *Langan v. Iowa, etc. Constr. Co.*, 49 Iowa, 317 (1878). Where the general incorporating act does not provide for the incorporation of railroad or banking corporations under it, a corporation organized under it to buy and sell railroad stock and bonds and to lease railroads and operate and aid them is void. *Clarke v. Central R. R.*, 50 Fed. Rep. 338 (1892). But see *S. C. sub nom. Clarke v. Richmond, etc. R’y*, 62 Fed. Rep. 328 (1894).

§ 237. *Liability as partners by reason of the fact that the corporation is incorporated in one state, but does all its business in another state.*—By the comity of states the rule has become well established that a corporation organized under the laws of a state may transact business beyond the borders of that state.¹

A broad and liberal view of the comity of states and the interests of business was taken by the New York court of appeals in the cases of *Demarest v. Flack*,² and *Merrick v. Van Santvoord*,³ where the court refused to hold the stockholders liable as partners, although the companies were clearly organized for

¹ "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another." Taney, Ch. J., in *Bank of Augusta v. Earle*, 13 Pet. 519, 588 (1839).

² It is legal for citizens of New York to take out a charter in West Virginia, even though all the corporate business is to be transacted in New York. The stockholders are not liable as partners. *Demarest v. Flack*, 128 N. Y. 205 (1891). The court said (p. 217): "If in any particular case it is thought by those interested in the matter that the business can be done in our own state and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form." Affirming *Demarest v. Flack*, 11 N. Y. Supp. 83 (1890).

³ *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866), reversing *Merrick v. Brainard*, 38 Barb. 574 (1860), where, although a Connecticut corporation did all its corporate business and per-

formed all its corporate acts in New York except the holding of elections, yet the court, in a well-considered and ably-written opinion, held that the corporation did not thereby lose its corporate character, and that its members were not liable as partners, saying: "We think the recognition, in our state, of the rights hitherto conceded in our courts to foreign corporations is neither injurious to our interests, repugnant to our policy, nor opposed to the spirit of our legislation. . . . It would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad. . . . A corporation is an artificial being, and has no dwelling, either in its office, its warehouses, its depots, or its ships. . . . The grant of franchises without restriction is equivalent to a specific authority to exercise them wherever the company might find it convenient or profitable, whether within or without the limits of the state of Connecticut." A New Jersey corporation is legally organized even though all of its incorporators, with one exception, are citizens and residents of New York state. *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576 (1894).

the purpose of doing all of their business outside of the state wherein they took out their charters. This rule of law has been laid down by the courts of Ohio also, and is established by the great weight of authority.¹ Although a bill in equity

¹ Although parties incorporated in Kentucky, by reason of the greater liberality of the Kentucky corporation statutes, and although the corporation does all its business in Ohio, nevertheless its corporate charter is recognized, and the stockholders are not liable as partners on a corporate note. *Second Nat. Bank v. Lovell*, 2 Cin. (Ohio), 397 (1873); *Second Nat. Bank v. Hall*, 35 Ohio St. 158 (1878), the court holding it to be no fraud on the Ohio laws for a corporation organized under the laws of Kentucky to do all its business in Ohio, even though thereby the stockholders escape a personal liability. A corporation may be organized in one state and do all of its business in another state. *Missouri Lead, etc. Co. v. Reinhard*, 114 Mo. 218 (1893). Citizens of Rhode Island may incorporate a company in Kentucky for the purpose of doing business in Rhode Island. *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484 (1894). In *People v. Fidelity, etc. Co.*, 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multifarm insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois. See also *Danforth v. Penny*, 44 Mass. 564 (1842). A subscriber to stock in a West Virginia corporation doing all its business in Minnesota cannot set up that the company was not legally incorporated, and cannot set up that the plaintiff is not a corporation, he having participated in its incorporation. *Minnesota, etc. Co. v. Denslow*, 46 Minn. 171 (1891). In *Wright v. Lee*, 2 S. D. 596 (1892), it appears that a Minnesota corporation did all its business in South Dakota. The court held this to be legal. See also *Atchison, etc. R. R. v. Fletcher*, 35 Kan. 236, 242-244 (1886). Concerning the legality, purpose, and effect of persons incorporating in one state with the intention of doing all of the corporate business in another state, see an article in 25 Am. Law Rev. 352, criticising the law as laid down above, and another article in 26 Am. Law Rev. 342, commending the law as laid down above. *Bateman v. Service*, L. R. 6 App. Cas. 396 (1881); *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 (1869). A charter will not be forfeited merely because the corporation was incorporated in one state and all its officers and stockholders reside in another state; nor because it keeps its books out of the state in violation of a statute. *North, etc. Stock Co. v. People*, 147 Ill. 234 (1893). A party contracting with a foreign corporation to pay it in oil from land assigned by it to him cannot defeat the suit of the corporation by alleging that it was incorporated in another state to do all its business in the state, and thereby was guilty of a fraud. *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343 (1875). A corporation of one state "lawfully may, as they often actually do, remove their officers, agents, offices, and effects into another sovereignty, and there exercise their functions and franchises." *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364 (1878). A Connecticut corporation may hold land in New Hampshire, although it does little or no business in Connecticut. *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73 (1884). A corporation

sets forth that a corporation is merely a pretended corporation as a part of a fraudulent scheme, and is really nothing but a partnership, nevertheless, if such corporation has an existing charter, it exists as a corporation, sufficiently at least to oust

may sell its products in any state and collect notes given in payment. *Hall v. Tanner, etc. Co.*, 91 Ala. 363 (1890). "Comity between the states authorizes a corporation to exercise its charter powers within another state, but it does not permit the exercise of a power where the policy of that state, distinctly marked by legislative enactments or constitutional provision, forbids it." In this case the consolidation of competing lines of railway was involved. *Clarke v. Central R. R.*, 50 Fed. Rep. 338 (1892). But see *S. C. sub nom. Clarke v. Richmond, etc. R'y*, 62 Fed. Rep. 328 (1894). A limited partnership formed under the laws of Spain will be recognized and upheld by our courts. *King v. Sarria*, 69 N. Y. 24 (1877), where the court discusses the comity of states. See also *Missouri Lead Min. Co. v. Reinhard*, 114 Mo. 218 (1893), where a Missouri corporation sold all its property to an English corporation. In *Christian Union v. Yount*, 101 U. S. 352 (1879), involving the question whether a foreign corporation could, by bequest, take land in Illinois, the court said: "In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation or from the settled adjudications of its highest court." See also *Oregonian R'y v. Oregon R'y & Nav. Co.*, 23 Fed. Rep. 232 (1885), where

the plaintiff, an English corporation, did all its business in Oregon; reversed on another point, 130 U. S. 1 (1889). A corporation "may do business in all places where its charter allows and the local laws do not forbid." *Canada Southern R'y v. Gebhard*, 109 U. S. 527 (1883). See also *Cowell v. Springs Co.*, 100 U. S. 55 (1879), holding that a Pennsylvania corporation authorized to purchase land in states and territories west of the Mississippi may purchase land in Colorado, and such purchase is valid, where no statute of Colorado prohibits it. And see *Stockton v. Baltimore, etc. R. R.*, 32 Fed. Rep. 9 (1887). In *Hollis v. Drew Theol. Sem.*, 95 N. Y. 166 (1884), the court said, as to foreign corporations, that the courts could not exclude them from doing business in the state. "Unless the legislature forbids, they can come here as freely as natural persons, and exercise here all the powers conferred upon them by their charters, subject to the same limitations imposed upon natural persons; that is, they can do no acts in violation of our laws or of our policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations could do." See also *Bard v. Poole*, 12 N. Y. 495 (1855); *Mumford v. American Life, etc. Co.*, 4 N. Y. 463, 482 (1851); *Re New York, L. & W. R. R.*, 35 Hun, 220 (1885). In *People v. Fire Assoc.*, 92 N. Y. 311 (1883), the court, in holding that the state may prohibit a foreign insurance company from doing business within its borders unless a certain tax was paid, said: "The right of a state to exclude foreign corporations is perfectly set-

the federal court of jurisdiction of the case.¹ But where property is transferred to a non-resident corporation for the sole purpose of enabling the parties to litigate a claim in the United States courts, the United States courts will refuse to take jurisdiction.²

§ 238. There are a few decisions refusing to recognize such incorporations. In Massachusetts it has been held that where a citizen of Massachusetts incorporates a company in New Hampshire, and states in the certificate of incorporation that the chief place of business is in a city in New Hampshire, and that he and his associates are jointly interested, the corporation is fraudulent and void—it being proved, in fact, that all the business was carried on in Massachusetts, and that the associates were “dummies,” having one share of stock each.³

In New Jersey, at an early day, it was held that a corporation could not become incorporated under the laws of New York for the purpose of carrying on all its corporate transac-

tled and not open to debate. Out of comity between the states has grown a right founded upon implied consent. Where a state does not forbid, or its public policy, as evidenced by its statutes, is not infringed, a foreign corporation may transact business within its boundaries, and be entitled to the protection of its laws.” As was said by Chancellor Kent in *Silver Lake Bank v. North*, 4 Johns. Ch. 370 (1820), in reference to allowing foreign corporations to sue in our courts, such a policy is demanded by comity, since otherwise they might say: “What race of men is this, from whose shores we are excluded?”

¹*Empire Coal, etc. Co. v. Empire Min. etc. Co.*, 150 U. S. 159 (1893). In *Irvine Co. v. Bond*, 74 Fed. Rep. 849 (1896), an owner of land in California incorporated a company under the laws of West Virginia and transferred to it, in payment for stock, certain portions of his land. He owned all the stock, and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was

legal so far as the jurisdiction of the United States court was concerned.

²*Lehigh, etc. Co. v. Kelly*, 160 U. S. 327 (1895).

³*Montgomery v. Forbes*, 148 Mass. 249 (1889). In this case the holder of a note signed in the corporate name, and given for goods sold, sued a stockholder for the price of the goods. The court sustained the suit and said: “The apparent corporation was not a corporation. . . . The defendant’s pretended associates were associates only in name; he alone was interested in the enterprise. The articles of agreement were recorded in Nashua [N. H.], and stated that the business was to be carried on there; but it was not in fact carried on there, and was not intended to be. This is not a case where there has been a defective organization of a corporation which has a legal existence under a valid charter. Here there was no corporation. . . . The business was [defendant’s] personal business, which he transacted under that name.” *Cf. Saltmarsh v. Spaulding*, 147 Mass. 224 (1888).

tions in the state of New Jersey.¹ The stockholders were decided to be merely partners. Likewise it was held that where a corporation was incorporated to do business in a certain city in the state, but actually does all its business in another city of that state, the incorporation is a fraud upon the law, and the company is the same as though unincorporated.²

In these days, however, when New Jersey is the favorite resort for the class of corporations now under consideration, the laws of that state having been framed especially for the purpose of attracting them, it is not at all probable that the old decisions in that state on this subject would be adhered to.

In Texas it has been held that its citizens are liable as partners where they incorporate in another state to carry on a mer-

¹The corporation "cannot be recognized by any court in New Jersey as a legally constituted corporation, nor be dealt with as such. If it can be, what need is there of any general or special law in our state? Individuals desirous of carrying on any manufacturing business may go into the city of New York, organize under the general laws of that state, erect all their manufacturing establishments here, and, under their assumed name, transact their business, not only free from all personal responsibility, but under cover of a corporation not amenable to our laws." *Hill v. Beach*, 12 N. J. Eq. 31 (1858).

²The corporation was incorporated to do business in Trenton, but actually transacted all its business in Jersey City. The court said: "The doctrine that the organization cannot be inquired into collaterally has no application as the case stands, because the charter does not fit this company, and was not intended for it." *Wonderly v. Booth*, 36 N. J. L. 250 (1873). This doctrine was followed in a New York case in an inferior court, the facts being that a New Jersey corporation had no office or place of business in New Jersey, and did no business there, but transacted its business in New York. "It

was not an existing corporation within the meaning of the statute of New Jersey, under which it purports to have been incorporated. . . . It was a fraud upon the laws of New Jersey, and cannot screen defendants and its organizers from personal responsibility as partners for contracts made in New York under the assumed name." *Kruse v. Dusenbury*, 19 N. Y. Week. Dig. (N. Y. Com. Pl.) 201 (1884). This last case seems to have been decided without noticing *Merrick v. Van Santvoord*, 34 N. Y. 208 (1866), and the case certainly is not the law of New York. Chief Justice Beasley, in *Erie R'y v. State*, 31 N. J. L. 531, 544 (1864), says: "A statute that should abolish the rule of comity, and should refuse a recognition of foreign corporations, would, it is conceived, have this effect, and no more, *i. e.*, to convert the foreign corporators, as to the state enacting the supposed law, into a partnership of individuals." An injunction does not lie at the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein. *Stockton v. American, etc. Co.*, 36 Atl. Rep. 971 (N. J., 1897).

cantile business in Texas, the legislature of Texas having substantially forbidden incorporation for that purpose.¹

In Canada, also, at an early day, the same rule seems to have been laid down.²

§§ 239, 240. There certainly is a limit beyond which the courts will not go. In order that such contracts may be upheld and the corporate character be sustained, it is necessary that both the state creating the corporation and the corporation so created shall have acted in good faith in conferring and taking the corporate privileges. Thus, where a corporation was incorporated by the legislature of Pennsylvania, and authorized to do business anywhere but in that state, the court of Kansas refused to recognize its corporate character.³ The com-

¹Stockholders are liable as partners in Texas, on business done in Texas, where they organized a corporation in Iowa to do a mercantile business, the laws of Texas not authorizing incorporation for that purpose. *Empire Mills v. Alston Grocery Co.*, 15 S. W. Rep. 200 (Tex., 1891). It appeared in this case, however, that the legislature had expressly declared the policy of the state by repealing a statute that authorized incorporation for mercantile purposes. See S. C., 15 S. W. Rep. 505, on rehearing. The fact that the company is doing all its business in another state does not release the company from its obligation to issue certificates of stock to its stockholders. *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50 (1891).

²In Canada it is held that no state can validly authorize a body corporate to transact business out of its own territory. *Bank of Montreal v. Bathune*, 4 Up. Can. (Q. B.) (O. S.) 341 (1832); *Genesee Mut. Ins. Co. v. Westman*, 8 Up. Can. (Q. B.) 487 (1852); *Union Rubber Co. v. Hibbard*, 6 Up. Can. (C. P.) 77 (1855). If carefully examined, these cases decide that a corporation formed to carry on a particular business in one country exceeds its powers if it carries on a similar business out of that country.

At the same time the judges who decided those cases based their judgments on supposed grounds of international law. The first case mentioned above held that a bank chartered in Lower Canada has no power to discount a note in Upper Canada and sue upon the same, but may recover for money had and received. In the case of *Genesee Mut. Ins. Co. v. Westman*, 8 Up. Can. (Q. B.) 487 (1852), the court held that a New York corporation had no right or power to enter into any contract at all or transact any business in a corporate capacity in that province. In *Reynolds v. Gallihar, etc. Co.*, 19 Nova Scotia Rep. 466 (1886), it appears that a Massachusetts corporation owned a mine in Nova Scotia. The decision was concerning an attachment, and the legality of the company's acts was not questioned. A foreign corporation may hold personal property in Ontario. *Commercial, etc. Bank v. Concoran*, 6 Ont. Rep. (Can.) 527 (1884).

³*Land Grant R'y v. Coffey County*, 6 Kan. 245 (1870), the court saying: "No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not

ity of states does not prevail to that extent. So also, where parties take out a charter in Tennessee, but, instead of holding their organization meetings in Tennessee, hold them in Florida, where they do all their business, they are liable in Florida as partners.¹ It may be good ground for the forfeiture of the charter that the corporation is intended solely for business in another state.²

§ 241. *Assessments by the corporation in excess of the par value of the stock — Stockholders are not liable therefor.*— It is a principle of law, coeval with the existence of corporations having a capital stock, that, unless the corporate charter or a constitutional statute provides otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable

allow them to do business within its own boundaries." And see Opinion of Attorney-General of Texas (1887), 2 R'y & Corp. L. J. 433, to the effect that a Scotch corporation, authorized to purchase land anywhere excepting at home, cannot hold lands in Texas. Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas did not allow incorporation for that purpose. Galveston, etc. Co. v. Perkins, 26 S. W. Rep. 256 (Tex., 1894). In Kansas the charter of a corporation may be forfeited at the instance of the state, if the corporation fails to keep its general office and the office of its treasurer within the state, in accordance with the terms of the statutes. State v. Topeka Water Co., 52 Pac. Rep. 422 (Kan., 1898).

¹ Taylor v. Branham, 35 Fla. 297 (1895). The dicta in this decision as to the liability of stockholders generally in foreign corporations doing business in Florida are startling, to say the least. Where a charter is taken out in one state and the organization meetings are held in another state, the presumption is that

no corporation is organized, and unless proof is given that the statutes of the first-named state authorized the holding of the organization meeting in another state, the stockholders are liable as partners. Duke v. Taylor, 37 Fla. 64 (1896).

² In State v. Park, etc. Co., 58 Minn. 330 (1894), the court forfeited the charter of a company that had been incorporated in Minnesota for the purpose evidently of doing all its business in Wisconsin. The charter was forfeited on the ground that the company had not complied with the statute, in having its place of business, and keeping its books, within the state. The court also approved of a decision in Wisconsin to the effect that at common law a charter may be forfeited where the corporation keeps its principal office, books, and records out of the state to such an extent that it is impossible for the state and its courts to have full jurisdiction and visitatorial power over the corporation. Where a corporation removes all its offices from the state, a stockholder may apply, under a statute, for a dissolution on the ground of an abuse of powers. Simmons v. Norfolk, etc. Steamboat Co., 113 N. C. 147 (1893).

and cannot be made to pay any sums in addition thereto.¹ The mere legislative act of creating a corporation produces by implication this limited liability of its members. For this reason the statutes regulating joint-stock companies are fre-

¹ *Great Falls, etc. R. R. v. Copp*, 38 N. H. 124 (1859); *State v. Morristown Fire Assoc.*, 23 N. J. L. 195 (1851); *Morley v. Thayer*, 3 Fed. Rep. 737 (1880); *Chase v. Lord*, 77 N. Y. 1 (1879); *Slee v. Bloom*, 19 Johns. 456, 473 (1822); *Shaw v. Boylan*, 16 Ind. 384 (1861); *Coffin v. Rich*, 45 Me. 507, 511 (1858); *Gray v. Coffin*, 63 Mass. 192, 199 (1852); *French v. Teschemaker*, 24 Cal. 518, 540 (1864); *Norton v. Hodges*, 100 Mass. 241 (1868); *Buenz v. Cook*, 15 Colo. 38 (1890). "The personal liability of stockholders for the debts of the corporation arises only from statute." *United States v. Stanford*, 161 U. S. 412, 429 (1896). Stockholders are not liable at common law over and above the stock itself. *Wells v. Green Bay, etc. Co.*, 90 Wis. 442 (1895). "The creation of the corporation necessarily destroys the common-law liability of the individual members for its debts." *People v. Coleman*, 133 N. Y. 279 (1892). "After the full par value of the stock subscribed for has been paid, the common-law liability of the stockholder, both as respects the corporation and its creditors, is at an end." *Toner v. Fulkerson*, 125 Ind. 224 (1890). The chief stockholders cannot be held liable for the corporate debts on the theory of a "general understanding" that they would be responsible. The corporation alone is liable. Circulars, bill-heads, letters, etc., used in the business and containing the corporation's name are admissible to show that the business was conducted in the corporate name and on the corporate responsibility. *Butte Hardware Co. v. Wallace*, 59 Conn. 336 (1890). The individual stockholders of a corporation are not liable for the debts of the cor-

poration, and an attachment against it cannot be levied on their property. *Owen v. Marshall*, 69 Wis. 486 (1891). If an attempt is made to assess fully paid-up stock and to sell it for non-payment, an injunction will lie. *San Antonio St. R'y v. Adams*, 25 S. W. Rep. 639 (Tex., 1894). The holders of full-paid stock cannot be assessed on such stock, even under a reorganization agreement of the majority of the stockholders. Where, however, for four years the stockholder does not object, and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer and give him damages for the value of his stock at the time of the demand of transfer, together with interest. *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52 (1893). Stockholders are not liable for services rendered to the company, even though they induce the party to render such services. *Davidson v. Westchester, etc. Co.*, 99 N. Y. 558 (1885); *Oliver v. Liverpool, etc. Ins. Co.*, 100 Mass. 531, 539 (1868), holding that, in order to prevent this limited liability, the English parliament expressly declared joint-stock companies not to be incorporations. *Moore v. New Jersey, etc. Co.*, 5 N. Y. Supp. 192 (1889); *Myers v. Irwin*, 2 Serg. & R. (Pa.) 368, 371 (1816), the court saying: "The personal responsibility of the stockholder is inconsistent with the nature of a body corporate;" *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 576 (1879); *New England Com. Bank v. Newport Steam Factory*, 6 R. L. 188 (1859); *Walker v. Lewis*, 49 Tex. 123 (1878); *Green v. Beckman*, 59 Cal. 545 (1881); *Jones v. Jarman*, 34 Ark. 323 (1879); *Windham Prov. Inst. v. Sprague*, 43

quently careful to state that nothing therein contained shall give such companies the character of corporations.¹ The older text-books and the earlier reports did not emphasize or fully appreciate the vitality of this principle of law. Of such importance is it that it would seem to be the great and distinguishing

Vt. 502 (1871); *Woods v. Wicks*, 7 Lea (Tenn.), 40 (1881), on the ground that the corporate creditor contracts not with the stockholders, but with the corporation; *Terry v. Little*, 101 U. S. 216 (1879), the court saying: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law;" *Smith v. Huckabee*, 53 Ala. 191 (1875), where the court said: "Immunity from such liability is one of the inducements which has led to the multiplication of private corporations, and caused them to supersede, to a great extent, in hazardous enterprises, or enterprises requiring large capital, partnerships;" *Spense v. Iowa Valley Constr. Co.*, 36 Iowa, 407 (1873), the court saying: "It is one of the distinguishing features of incorporations that the individual property of its members may be exempt from liability for corporate debts. Herein consists the great superiority of a corporation over a partnership or an unincorporated joint-stock company." *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52 (1878); *Van Sandau v. Moore*, 1 Russ. Ch. 441, 457 (1826); *Atwood v. Rhode Island Agric. Bank*, 1 R. I. 376 (1850); the court saying: "At common law the stockholders in a corporation are not liable individually for the corporate debts. The capital stock is the fund to which alone the creditors must resort, unless in cases of fraud." The case of *Atlantic De Laine Co. v. Mason*, 5 R. I. 463 (1858), holds that the payment of one invalid assessment is no waiver of the right to object to another. *Cf. Field v. Pierce*, 102 Mass. 253 (1869). If the stockholders vol-

untarily contribute to the corporate treasury in order to make it a success, such gifts are not corporate debts and cannot be recovered back. *Bidwell v. Pittsburgh*, etc. R'y, 114 Pa. St. 535 (1887); *Leavitt v. Oxford*, etc. Co., 3 Utah, 265 (1883).

In England "the liability of a shareholder in a corporate body is determined by the conditions of incorporation. Without express provision, no member of a corporate body is individually liable for the corporate debts. A company may be registered under the Companies Act, 1862, with limited or unlimited liability; according to the nature of such registration a shareholder will be liable to contribute, respectively, the unpaid amount on his shares, or to the extent of the company's guaranty, or indefinitely." *Cavanagh, Money Securities* (2d ed.), 494, citing *Lion*, etc. Ins. Assoc. v. *Tucker*, L. R. 12 Q. B. D. 176 (1883); *Re Norwich Ins. Soc.*, L. R. 13 Ch. D. 693 (1880); *Re City of Glasgow Bank*, L. R. 4 App. Cas. 337, 550, 567, 581, 583, 598, 607, 615, 624, 632 (1879); *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317 (1880). Under the California statute an assessment may be made on stock for "paying expenses, conducting business, or paying debts." Code, § 331; *Younglove v. Steinman*, 80 Cal. 375 (1889). In Utah, by statute, stockholders may be assessed on their stock, even after the stock has been paid up, the assessment being for working expenses. *Gary v. York Min. Co.*, 9 Utah, 464 (1894).

¹ *Oliver v. Liverpool*, etc. Ins. Co., 100 Mass. 531, 539 (1868); N. Y. Laws, 1854, ch. 245, § 3. And see ch. XXIX, *infra*. *Cf. 75 N. W. Rep.* 837.

characteristic of corporations, and not a subsidiary or unimportant one. It seems to have been assumed rather than established by direct adjudication.¹ In the early turnpike company cases of New England a contrary rule appears to have been assumed, and the subscriber appears to have been open to assessments indefinitely, except that he might refuse to pay, and thus enable the company to forfeit his stock.² Such companies, however, had no fixed par value of their stock. At present the rule of non-liability at common law, beyond the par value of the stock, is established beyond question, and forms the chief inducement in the formation of the many corporations of the day. "Where stockholders voluntarily assess themselves, to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not debts against, but assets of, the corporation."³

§ 242. Attempts have been made in various ways to authorize the assessment of stockholders for amounts after the par value of their stock has been paid in. Such efforts have generally failed. It cannot be done by a majority vote of the stockholders, nor of the directors, nor by a by-law.⁴ The liability is some-

¹In the case of *Carr v. Iglehart*, 3 Ohio St. 457 (1854), the court took counsel to task for questioning this principle of law. For an opinion that at common law the stockholders were liable for all corporate debts, see *Harvard Law Rev.*, Nov., 1888, p. 160.

²*Middlesex Turnp. Co. v. Swan*, 10 Mass. 384 (1813).

³*Brodrick v. Brown*, 69 Fed. Rep. 497 (1895). See § 76, *supra*.

⁴*Flint v. Pierce*, 99 Mass. 68 (1868); *Andover Free Schools v. Flint*, 54 Mass. 539 (1847); *Kennebec, etc. R. R. v. Kendall*, 31 Me. 470 (1850); *Reid v. Eaton Mfg. Co.*, 40 Ga. 98 (1869). In the first-mentioned case the defendant subscribed to such a by-law, among other by-laws, when he subscribed for stock. Placing the words "individual property of stockholders liable" on the face of corporate liabilities has no effect in itself. Stockholders are liable only as prescribed by

law. *Lowry v. Inman*, 46 N. Y. 119 (1871). An agreement of a vendee of stock with the vendor to pay the corporate debts is not enforceable by corporate creditors. *Andover Free Schools v. Flint*, 54 Mass. 539, 543 (1847). But the agreement is enforceable if made directly with creditors. *Maxwell's Case*, L. R. 20 Eq. 585 (1874). By consent of the stockholders each share may be subject to further assessment; and, when this agreement is printed on the certificates, the purchaser is bound by it. *Weeks v. Silver, etc. Co.*, 55 N. Y. Super. Ct. 1 (1887). The case, however, of *Hume v. Win-yah, etc. Canal Co.*, Carolina L. Jour. 217, held, at an early day, that where a corporation, not professing to have any fixed capital, made a by-law by which each of the corporators was bound to contribute equally or ratably to all expenses incurred, the corporators were liable personally. See

times created by statute.¹ Where the state has reserved the power to alter, repeal, or amend the charter, it may authorize the corporation to levy assessments on its stockholders, in addition to the subscription of their stock. The reasoning of this rule is clear. The limited liability is a part of the corporate privileges conferred. A right to repeal the franchises includes the right to repeal in part or altogether the franchise or privilege of limited liability. On such grounds, laws of this character, however harsh in their operation, are upheld as constitutional.²

§ 243. *Miscellaneous cases of liability or non-liability.*—It has been held, on grounds of public policy, that although a corporation is advertised as having a capital stock of a fixed amount, the shareholders and directors are not liable personally, even though subscriptions have not been taken to that amount. They are not liable either for the untaken stock, or on the ground of false representations, since the capital stock is understood to represent what the corporation hopes to obtain in subscriptions.³

Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52 (1893).

¹ In California, under sections 331, 333 of the Civil Code, a corporation may assess its members to any extent "for the purpose of paying expenses, conducting business, or paying debts." Santa Cruz R. R. v. Spreckles, 65 Cal. 193 (1894). In California all shares of stock are assessable, even though they have once been fully paid. Green v. Abietine Med. Co., 96 Cal. 322 (1892). In Vermont it is held that under a charter provision that "if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise, the directors shall forthwith repair the same by assessment," a receiver was not allowed to assess, since the provision is only to prevent a continuance of business with an impaired capital. Dewey v. St. Albans Trust Co., 57 Vt. 332 (1885). In Pennsylvania it is held that, though the corporation has power to assess beyond the par value of the stock, yet such

power may be restricted by by-law. Price's Appeal, 106 Pa. St. 421 (1884). In Texas it is possible to form a corporation wherein assessments may be made on members ratably to any amount for corporate purposes. Guadalupe, etc. Assoc. v. West, 70 Tex. 391 (1888)—a live-stock-protecting corporation. In Idaho it is held that the statutory provisions rendering stockholders jointly and severally liable for debts authorize the directors to levy assessments to pay for improvements already made. Sparks v. Lower Payette Ditch Co., 2 Idaho, 1030 (1892).

² Gardner v. Hope Ins. Co., 9 R. I. 194 (1869); South Bay, etc. Co. v. Gray, 30 Me. 547 (1849). See also §§ 280, 497, *infra*.

³ First Nat. Bank v. Almy, 117 Mass. 476 (1875); Wakeman v. Dalley, 51 N. Y. 27, 30 (1872); Evans v. Coventry, 25 L. J. (Ch.) 489 (1856); Crease v. Babcock, 51 Mass. 525, 557 (1846). *Contra*, Haslett v. Wotherspoon, 1 Strobbh. Eq. (S. C.) 209, 229 (1847). In Illinois

But where, under the Wisconsin statute, articles of incorporation have been duly filed, but no capital stock is subscribed for, and the incorporation is practically abandoned, and a part of the incorporators go on and incur debts in the corporate name with the knowledge of the others, all are liable as partners.¹

there is a statutory liability in a case like this. Stat. of Ill., ch. 32, § 18. A corporation may commence business before any stock is subscribed unless the charter forbids. *Johnson v. Kessler*, 76 Iowa, 411 (1888). Where, by the charter, a certain amount of the capital stock must be paid in before business is commenced, it is sufficient that that amount was paid in by a few stockholders paying their subscriptions in full. *Lauder v. Logan*, 123 Pa. St. 34 (1889). See also § 180, *supra*. A stockholder is not liable for the debts merely because the corporation did business before the full capital stock was subscribed. *American, etc. Co. v. Bulkley*, 65 N. W. Rep. 291 (Mich., 1895). Even though a corporation incurs debts before any stock is subscribed for, and even though no stock is ever subscribed for, yet the incorporators are not liable for such debts. *Singer, etc. Co. v. Peck*, 67 N. W. Rep. 947 (S. D., 1896). Where the proposed corporation is abandoned before being incorporated, the parties who subscribe and then withdraw their money are not liable for subsequent debts. *Gorman v. Davis, etc. Co.*, 118 N. C. 370 (1896). Subscribers for stock are not liable for such part of the capital stock as has not been subscribed for by any one, no fraud being involved. *Sweney v. Talcott*, 85 Iowa, 103 (1892). Stockholders are not liable as partners merely because the whole capital stock has not been subscribed. *Thornton v. Balcom*, 85 Iowa, 198 (1892); *National Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). It is not actionable negligence in directors to proceed to business where

only a small part of the capital is subscribed. *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890). Paying in half of the subscription with a view to incorporation, and then abandonment of incorporation, does not render a subscriber liable as a partner. *Hudson v. Spaulding*, 6 N. Y. Supp. 877 (1889). The directors are not liable for corporate debts merely because they commence business before the capital stock is subscribed. The incorporation was legal without it. *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889).

¹*Wechselberg v. Flour City Nat. Bank*, 64 Fed. Rep. 90 (1894). The incorporators are not liable for goods purchased after the incorporation papers are filed, but before the organization meeting where the company accepted the goods. *Badger Paper Co. v. Rose*, 95 Wis. 145 (1897). Where, upon incorporation, the capital stock is fixed at \$25,000, and is subscribed, but no part thereof is paid in, and business is commenced, the participators are liable as partners under the Pennsylvania statute. It is a fraud. *Hill, etc. Co. v. Stetler*, 127 Pa. St. 145 (1888). Where stockholders proceed to business before the minimum capital prescribed by statute is subscribed, and before the requisite amount is subscribed, they are liable to corporate creditors for such minimum capital. The creditors may sue them and the corporation in the same action. *Burns v. Beck, etc. Co.*, 83 Ga. 471 (1889). Where the alleged directors of an athletic association enter into contracts in its name after the charter is acknowledged and filed with the secretary of

An oral promise to pay corporate debts is void by the statute of frauds.¹ Partners, by becoming incorporated, do not thereby cease to be partners as to all the debts of the former partnership.² A stockholder is not liable as a partner by reason of misrepresentations that the corporation is solvent, though probably he would be liable in damages for false representations.³ Upon the dissolution of the corporation the liability of the stockholder as to any further business ceases. If the business is carried on thereafter by the agents, no liability therefor attaches to the former stockholders,⁴ unless they expressly authorize it.⁵ Persons who purchase a railroad at an execution sale thereof cannot continue to run it in the name of the old railroad corporation, and thereby be protected from liability

state, but no capital stock is subscribed and no steps taken to complete the organization or comply with the law, the directors are personally liable on such contracts. *Walton v. Oliver*, 49 Kan. 107 (1892). In *Consolidated, etc. Co. v. Kansas City, etc. Co.*, 45 Fed. Rep. 7 (1891), the court said: "It is true, as contended by counsel, that the statute did not require that this increment of stock should be actually paid up. Yet the public deals with such concerns on the faith of such capital *in esse*, and it is that which chiefly gives it credit. It is to be imputed to these directors and stockholders that they pretended and claimed all along that the stock subscribed by them was paid up." Where no stock is subscribed for, but an organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. *Whetstone v. Crane, etc. Co.*, 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters. Where a stock corporation has received no stock subscription and issued no stock it cannot maintain a suit. *Aspen Water, etc. Co. v. Aspen*, 5 Colo. App. 12 (1894). A corporate creditor may hold the stockholders personally liable on the ground of fraud where they incorpo-

rate with a capital stock of \$200,000, and subscribe for one share each, and then incur large debts. *Detroit, etc. Works v. Riverside St. R'y*, 29 S. W. Rep. 412 (Tex., 1895). Where the directors commence business before ten per cent of the capital is paid in, as required by statute, the directors are personally liable as agents transacting business without authority from the principal. *Farmers's, etc. Co. v. Floyd*, 47 Ohio St. 525 (1890).

¹ *Andover Free Schools v. Flint*, 54 Mass. 539 (1847).

² *Broyles v. McCoy*, 5 Sneed (Tenn.), 602 (1858). The case of *Martin v. Fewell*, 79 Mo. 401, 412 (1883), holds also that, "for the debts incurred after they become a corporation, their liability will depend upon the fact of actual notice of their incorporation to the plaintiffs at the time such debts were incurred." See also § 675, *infra*.

³ *Searight v. Payne*, 2 Tenn. Ch. 175 (1874).

⁴ *Central City Sav. Bank v. Walker*, 66 N. Y. 424 (1876), *aff'g* 5 Hun, 34. A contract made by the officers after the charter has been forfeited does not bind the stockholders. *Wilson v. Tesson*, 12 Ind. 285 (1859).

⁵ *National Union Bank v. Landon*, 45 N. Y. 410 (1871).

as partners.¹ They do not succeed to its corporate character, although they purchase its property. In all cases, however, in which the members of an association might have been held liable as partners, the right of the creditor to enforce that liability is barred by his bringing suit and obtaining judgment against the supposed corporation.² Solvent subscribers are not liable on the subscriptions of subscribers whom the former knew to be insolvent.³ In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business—that being *ultra vires*.⁴ The directors of an amusement company are not personally liable, although they are a committee having charge of the construction of a grand stand that falls and injures a person.⁵ Although the statute declares that the word “limited” shall be a part of the name, and that the stockholders should be liable if not used, yet a single instance of failure to use it does not render the stockholders liable.⁶ The United States statute making every person interested in a still of liquors liable for the tax thereon renders the stockholders of the distilling corporation liable, and one who pays the tax may have contribution from the others.⁷ Stockholders are not liable as partners on the ground that the stock was watered.⁸ A person advancing money to an insolvent corporation to continue its business does not thereby become personally liable to a person furnishing material to the

¹ Chaffe v. Ludeling, 27 La. Ann. 607 (1875).

² Cresswell v. Oberly, 17 Ill. App. 281 (1885); Pochelu v. Kemper, 14 La. Ann. 308 (1859). The partners herein cannot bring an action at law against each other. Their remedy is inequity. Crow v. Green, 111 Pa. St. 637 (1886). See also ch. XXIX, *infra*, on Joint-stock Companies.

³ Wilson Cotton Mills v. C. C. Randleman, etc. Mills, 115 N. C. 475 (1894).

⁴ Lehman v. Knapp, 48 La. Ann. 1148 (1896).

⁵ Van Antwerp v. Linton, 89 Hun, 417 (1895).

⁶ Staver, etc. Co. v. Blake, 69 N. W. Rep. 508 (Mich., 1896). A statute may

require the word “limited” to be a part of the corporate name, and may render the stockholders personally liable for omitting the same. Lehman v. Knapp, 48 La. Ann. 1148 (1896).

⁷ Richter v. Henningsan, 110 Cal. 530 (1895). A stockholder who is compelled to pay a tax levied by the government on liquor distilled by the corporation may have contribution from the other stockholders. Wolters v. Henningsan, 114 Cal. 433 (1896). A tax against the property of the company cannot be enforced against a stockholder. State v. Catron, 118 Mo. 270 (1893).

⁸ Louisville Bkg. Co. v. Eisenman, 94 Ky. 83 (1893).

corporation.¹ In Kentucky the remarkable conclusion was reached that, where a corporation changed its name and used the new name without complying with the statute, the stockholders were liable as partners.² And an equally erroneous decision was reached in holding that, if a person buys all the stock of a company, the latter thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which were incurred on the credit of the company only.³ A party selling merchandise to what he supposed was a copartnership, but which actually was a corporation, may under some circumstances hold personally liable the individuals with whom he dealt. The fact that the vendor knew that the vendees were dealing in a name that indicated a corporation does not charge him with notice thereof.⁴

Although there are less stockholders and less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.⁵

Questions relative to the mode of organizing under a special charter are considered elsewhere.⁶ Stockholders sometimes guarantee the liabilities of the company. This class of contracts is considered elsewhere.⁷ Where a corporation is a mere "dummy," the courts will sometimes ignore its existence and reach the stockholders and officers. This class of cases also is considered elsewhere.⁸ Where stockholders are sued on a corporate liability, they need not plead the incorporation. They may merely deny liability.⁹

¹ Perkins v. Huntington, 19 N. Y. Supp. 71 (1892).

² Cincinnati Cooperage Co. v. Bate, 96 Ky. 356 (1894).

³ Louisville, etc. Co. v. Eisenman, 94 Ky. 83 (1893).

⁴ Rust-Owen L. Co. v. Wellman, 72 N. W. Rep. 89 (S. D., 1897).

⁵ Welch v. Importers', etc. Bank, 122 N. Y. 177 (1890).

⁶ See ch. XXXVI, *infra*.

⁷ See § 76, ch. IV, *supra*.

⁸ See § 6, *supra*.

⁹ Where suit is brought against stockholders to hold them liable as partners, they may deny liability,

and need not set up the affirmative defense that the corporation alone is liable. Demarest v. Flack, 128 N. Y. 205 (1891). In an action for damages the defense that the defendant is merely a stockholder in the party who really is liable should be set up by the general issue and not by a plea. Dade Coal Co. v. Haslett, 83 Ga. 549 (1889). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain where they were incorporated. Clark v. Wilcklow, 75 Hun, 290 (1894).

CHAPTER XIV.

LIABILITY OF PLEDGEES, TRUSTEES, EXECUTORS, AGENTS, ETC.

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| <p>§ 244. The subject.</p> <p>245, 246. The liability of trustees and <i>cestuis que trust</i>.</p> <p>247. The liability of a pledgee of shares—Pledge of stock by the corporation itself.</p> <p>248. The liability of an executor or administrator.</p> <p>249. The liability of principal and agent on stock standing in the agent's name.</p> <p>250. Liability where stock is subscribed for or held by or in</p> | <p>the names of infants and married women.</p> <p>§ 251. The liability of the corporation itself as a stockholder.</p> <p>252. The liability of legatees, assignees in insolvency, joint owners, and of a corporation owning stock in another corporation.</p> <p>253. The use of "dummies," and transfers to nominal and fictitious persons.</p> |
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§ 244. *The subject*.—Where the apparent owner of shares is not the real owner, the registered title to the stock being in one person and the equitable or real ownership being in another, various intricate questions have arisen involving the matter of liability for unpaid subscriptions and liability under the statute. The cases present every variety of ownership and every phase of liability, including many instances of transfer for the purpose of avoiding liability. The principles and rules of law governing this branch of the subject are somewhat numerous and complicated. Nevertheless they are comparatively well settled.

§§ 245, 246. *The liability of trustees and cestuis que trust*.—A trustee of stock who is recorded on the corporate books as a stockholder is, at common law, liable on such stock as though he were the absolute owner of the same. This is the rule even though he is recorded on the corporate books not as an absolute owner, but as a trustee of the stock.¹ And the liability of

¹ Chapman's Case, L. R. 3 Eq. 361 (1866); Davis v. Essex Baptist Soc., 44 Conn. 582 (1877); *Ex parte Bugg*, 2 Dr. & Sm. 452 (1865); Muir v. City of Glasgow Bank, L. R. 4 App. Cas. 337 (1879); Holt's Case, 1 Sim. (N. S.) 389 (1851); Mitchell's Case, L. R. 9 Eq. 363 (1870); King's Case, L. R. 6 Ch. App. 196 (1871); Grew v. Breed, 51 Mass. 569 (1846); Leifchild's Case, L. R. 1 Eq. 231 (1865); Hemming v. Maddick, L. R. 9 Eq. 175 (1870); *Re National Fin. Co.*, L. R. 3 Ch. App. 791 (1868); *Ind's Case*, L. R. 7 Ch. App. 485 (1872). But see Sayles v. Bates, 15 R. I. 342 (1886); Saunders's Case, 2 De G., J. & S. 101 (1864). A trustee is liable on the statutory liability on national-bank stock if the stock stands in his name personally. Kerr v. Urie, 37

the trustee is not limited by the amount of the trust property.¹ Each trustee is liable not merely for his proportion, but for the whole amount due upon the stock.² Sometimes by statute the trustee is liable only to the extent of the trust estate.³ Where stock stands in the name of a person as "trustee," he is liable thereon, even though he is acting merely as the agent of another person.⁴

The *cestui que trust* is not liable on the stock held by the trustees. The corporation cannot hold him liable; neither can the corporate creditors. The *cestui que trust* cannot be held either on the unpaid subscription or on the statutory liability of the stock. He is a stranger to the corporation and its creditors.⁵

But here the exemption of the *cestui que trust* ceases. He does not entirely escape liability. His exemption from liability to the creditors of the trust does not protect him from liability to the trustee. He is bound to indemnify the trustee and to repay to him any debts which the latter may have paid in the administration of the trust.⁶ The indemnity which the

Atl. Rep. 789 (Md., 1897). A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. *Lewis v. Switz*, 74 Fed. Rep. 381 (1896). On this subject of liability of trustees, see also § 705 on the liability of promoters; § 508 on the liability of officers of unincorporated associations; § 888 on the liability of committeemen, and § 724 on the liability of persons who sign their names and add an official title.

¹ Hoare's Case, 2 John. & H. 229 (1862).

² *Cunninghame v. City of Glasgow Bank*, L. R. 4 App. Cas. 607 (1879).

³ In New York, by statute, trustees holding stock in railroad or manufacturing corporations are released from liability. Laws of 1892, ch. 688, sec. 54. By the statutes of the United States a similar provision applies to national banks. R. S., § 5152. But

this exemption does not protect the trustee unless the stock registered in his name is registered to him as "trustee." *Davis v. Essex Baptist Soc.*, 44 Conn. 582 (1877). A trustee is not liable on national bank stock, his trusteeship appearing on the books. *Welles v. Larrabee*, 36 Fed. Rep. 866 (1888). See 86 *id.* 972.

⁴ *Wadsworth v. Laurie*, 164 Ill. 42 (1896).

⁵ *Mitchell's Case*, L. R. 9 Eq. 363 (1870); *Ex parte Bugg*, 2 Dr. & Sm. 452 (1865); *Williams's Case*, L. R. 1 Ch. D. 576 (1875); *King's Case*, L. R. 6 Ch. App. 196 (1871); *Fenwick's Case*, 1 De G. & Sm. 557 (1849); *Newry, etc. R'y v. Moss*, 14 Beav. 64 (1851).

⁶ *Butler v. Cumpston*, L. R. 7 Eq. 16 (1868); *James v. May*, L. R. 6 H. L. 328 (1873); *Chapman's Case*, L. R. 3 Eq. 361 (1866); *Re National Fin. Co.*, L. R. 3 Ch. App. 791 (1868); *Perry Trusts*, §§ 485, 486. In the case of *Jervis v. Wolferstan*, L. R. 18 Eq. 18 (1874), the court said, in enforcing

trustee may claim from him cannot be denied on the ground that the trustee is irresponsible, and consequently that the corporation cannot get anything from him.¹ But until the trustee is actually called on by the corporation to pay, he cannot compel the *cestui que trust* to give indemnity.²

This liability, however, of the *cestui que trust* may be avoided. If the trustees are willing to provide in the trust instrument that the *cestui que trust* shall not be liable, such a provision is legal and effectual. The *cestui que trust* then escapes liability absolutely and completely.³ This rule does not apply to a trans-

indemnity to the trustees of stock: "I take it to be a general rule that where persons accept a trust at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust; and under that doctrine I shall hold that the estate of the testator became liable to indemnify the trustees against the payment of this large sum of money." *Hemming v. Maddick*, L. R. 7 Ch. App. 395 (1872), where the court held also that the trustee might authorize the corporation to use the trustee's name and collect from the *cestui que trust*. In *Hughes-Hallett v. Indian, etc. Co.*, L. R. 22 Ch. D. 561 (1882), it is held that the trustees cannot sue for indemnity before the corporation has demanded payment. See also *Phené v. Gillan*, 5 Hare, 111 (1845), where a mortgagor of stock was held liable to indemnify the mortgagee, who had been held liable on the stock. The court said the mortgagor was liable the same as a "trustee of leasehold property under covenants for the benefit of a *cestui que trust*." In *Balsh v. Hyham*, 2 P. Wms. 453 (1728), the lord chancellor said that "it is a rule that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust," and consequently that the *cestui que trust* must repay to the trustee money borrowed by the latter and given to the

cestui que trust, the trust consisting of stock which was pledged to secure the loan. Approved in *Ex parte Chippendale*, 4 De G., M. & G. 19, 54 (1854). Lindley, Partn. 373, 374 (Ewell's 2d Am. ed.), says: "The right of a trustee to indemnity from his *cestui que trust* very closely resembles the right of an agent to indemnity from his principal. A trustee is clearly entitled to be indemnified out of the trust property against all costs, charges, and expenses properly incurred, and against all losses sustained by him in the execution of his trust; and if the trust property is not sufficient for the purpose of indemnifying him in respect of such matters, his *cestui que trust*, if under no disability, is personally liable to indemnify him, unless such liability is excluded by some special circumstance. . . . If there is an express covenant to indemnify, the obligation will be limited by the covenant."

¹ *Re National Fin. Co.*, L. R. 3 Ch. App. 791 (1868); *Cruse v. Paine*, L. R. 6 Eq. 641 (1868).

² *Hughes-Hallett v. Indian, etc. Co.*, L. R. 22 Ch. D. 561 (1882).

³ Thus, in *Ex parte Chippendale*, 4 De G., M. & G. 19, 52 (1854), the court says, in a dictum: "No doubt a company's deed, or any other deed, may be so framed as to deprive directors or trustees of the right to indemnity; and, if parties think proper to accept directorships or trusts under deeds

action where the registered stockholder is merely the nominal holder, or agent for another person.¹

§ 247. *The liability of a pledgee of shares — Pledge of stock by the corporation itself.*—A pledgee of stock, that is, one to whom the stock has been transferred in pledge or as collateral security, and who has had the stock transferred into his own name on the corporate books, is liable to the creditors of the corporation as though he were the absolute owner of the stock.² This rule has frequently been enforced in the case of a pledge of shares of stock in a national bank.³ A pledgee of certificates of stock may legally cause the stock to be transferred on the corporate books into the name of an irresponsible agent or representative of the pledgee. When this is done the pledgee is not liable on the stock.⁴ A statute frequently relieves the

so framed, they must abide by the consequences." See also *Gillan v. Morrison*, 1 De G. & Sm. 421 (1847), holding that an express agreement that the *cestui que trust* shall be liable to the trustee to a certain extent and no more is binding on the trustee.

¹ See §§ 249, 253, *infra*.

² *Pauly v. State L. & T. Co.*, 165 U. S. 606 (1897); *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895); *Tuthill Spring Co. v. Smith*, 90 Iowa, 331 (1894); *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147 (1895); *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896); *State v. Bank, etc.*, 73 N. W. Rep. 153 (Minn., 1897); *Chatham Bank v. Brobston*, 27 S. E. Rep. 790 (Ga., 1897); *Ball Elec. Light Co. v. Child*, 68 Conn. 522 (1897); *National Comm. Bank v. McDonnell*, 92 Ala. 387 (1891); *Moore v. Jones*, 3 Woods, 53 (1877); S. C., 17 Fed. Cas. 690; *Pullman v. Upton*, 96 U. S. 328 (1877); *Aultman's Appeal*, 98 Pa. St. 505 (1881); *Crease v. Babcock*, 51 Mass. 525 (1846); *Holyoke Bank v. Burnham*, 65 Mass. 183 (1853); *Sleeper v. Goodwin*, 67 Wis. 577 (1887); *Rosevelt v. Brown*, 11 N. Y. 148 (1854); *U. S. Trust Co. v. U. S. F. Ins. Co.*, 18 N. Y. 199 (1858); *Grew v. Breed*, 51 Mass.

569 (1846); *Royal Bank of India's Case*, L. R. 7 Eq. 91 (1868); S. C., L. R. 4 Ch. App. 252 (1869); *Weikersheim's Case*, L. R. 8 Ch. App. 831 (1873); *Price & Brown's Case*, 3 De G. & Sm. 146 (1850), in which the holders of shares taken as security, who had new shares issued in their own names in exchange for the old shares which had been called in, were declared to be contributories, though the directors knew the nature of their holding; *Richardson v. Abendroth*, 43 Barb. 162 (1864). And the pledgee is liable upon the stock even after his debt has been paid and the certificate handed back to the pledgor, if the retransfer is not properly entered on the corporate books. *Bowden [Bowdell] v. Farmers', etc. Nat. Bank*, 25 Int. Rev. Rec. 405 (1877); S. C., 3 Fed. Cas. 1029; *Johnson v. Somerville Dyeing, etc. Co.*, 81 Mass. 216 (1860); *Adderly v. Storm*, 6 Hill, 624 (1844).

³ *Pauly v. State L. & T. Co.*, 165 U. S. 606 (1897); *Magruder v. Colston*, 44 Md. 349 (1876); *Wheelock v. Kost*, 77 Ill. 296 (1875); *Hale v. Walker*, 31 Iowa, 344 (1871); *Barre Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563 (1879); *National Bank v. Case*, 99 U. S. 628 (1878). Cf. 86 Fed. Rep. 1006.

⁴ *Henkle v. Salem Mfg. Co.*, 39 Ohio

pledgee from his liability.¹ Where the pledgee of national bank stock causes it to be placed in the name of another person in order to avoid liability, such act is legal and the pledgor may be held liable on such stock.²

A pledgee of stock may protect his interest in the stock and may at the same time avoid liability as a stockholder by hav-

St. 547 (1883); *Welles v. Larrabee*, 36 Fed. Rep. 866 (1888). Where the pledgee of national bank stock causes new certificates to be issued in the name of one of his employees, the former is not liable on the stock. *National, etc. Bank v. Harmon*, 79 Fed. Rep. 891 (1897). In *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479 (1884), it is held that a pledgee of shares of stock in a national bank, who takes the security for his benefit in the name of an irresponsible person, as trustee, for the avowed purpose of avoiding individual liability as a share-owner, incurs no liability which can be enforced by creditors of the bank in case of its failure. To same effect, *Newry, etc. R'y v. Moss*, 14 Beav. 64 (1851). *Cf. Addison's Case*, L. R. 5 Ch. App. 294 (1870). A transfer of shares by one who holds them as collateral security, for the purpose of avoiding liability thereon, is not a conversion. *Heath v. Griswold*, 5 Fed. Rep. 573 (1881). See also §§ 466, 470, and *cf. § 253, infra*.

¹ N. Y. Laws, 1892, ch. 688, § 54; also Part VII, *infra*. See *McMahon v. Macy*, 51 N. Y. 155 (1872). A similar provision is found in the old New York Manufacturing Companies Act of 1848 (N. Y. Laws, 1848, ch. 40, § 16). See *Stover v. Flack*, 30 N. Y. 64 (1864); S. C., 41 Barb. 162. *Cf. Re Reciprocity Bank*, 22 N. Y. 9, 17 (1860). And a similar provision has been enacted in Maryland. *Matthews v. Albert*, 24 Md. 527 (1866). In *Burgess v. Seligman*, 107 U. S. 20 (1882), the supreme court of the United States construed the Missouri statute, and

held that the pledgees were not liable to corporate creditors upon the shares so held by them; and such also is the rule now in Missouri. *Union Sav. Assoc. v. Seligman*, 92 Mo. 635 (1887), overruling *Griswold v. Seligman*, 72 Mo. 110 (1880). See also *Melvin v. Lamar Ins. Co.*, 80 Ill. 446 (1875). In England, *Chapman's, etc. Case*, L. R. 3 Eq. 361 (1867); *Re Anglesea Colliery Co.*, L. R. 2 Eq. 379 (1866); *Ind's Case*, L. R. 7 Ch. 485 (1872), were under the Companies Act. In *Re City Terminus Hotel Co.*, L. R. 14 Eq. 10 (1872), a hotel company borrowed £40,000 of a railroad company and gave its unissued shares as security, they being placed in the hands of a trustee, with power to sell, and thus reduce the debt. Afterwards the railway company bought the hotel, and the hotel company was wound up. *Held*, that the railway company were not stockholders, but creditors, and were entitled to deduct the amount of the loan from the purchase-money. See also *Manchester, etc. Corp.'s Case*, 22 W. R. 41 (1873); *Nellis v. Coleman*, 98 Pa. St. 465 (1881), where the corporation received subscriptions as a loan, to be repaid. It was held to be valid. In Massachusetts the pledgee is liable on the stock as owner only when the certificate fails to show that the shares are held merely as collateral. *Barre Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563 (1879). And so in Connecticut. *Davis v. Essex Baptist Soc.*, 44 Conn. 582 (1877).

² *Pauly v. State L. & T. Co.*, 165 U. S. 606 (1897).

ing the stock transferred into his name as "pledgee;" in other words, by having the certificate made out to him in his own name, adding thereto the word "pledgee." Where the transfer is made in this manner, the pledgee is not liable on the statutory or subscription liability, even though the corporation becomes insolvent.¹

In some states there are statutes as well as decisions to the effect that notice to the corporation that a person holds as pledgee certain certificates of stock, which stand on the books of the company in the pledgor's name, prevents an attachment against the pledgor from reaching more than the equity of redemption in such stock.²

A pledgee of stock who holds the certificates, but who does not appear on the corporate books as a stockholder, is not liable as a stockholder.³ Where the corporation pledges its unissued stock in order to secure a corporate debt, the pledgee is not liable to other corporate creditors on such stock.⁴

¹Pauly v. State L. & T. Co., 165 U. S. 606 (1897). A pledgee of national bank stock is not liable on the statutory liability, where he is registered on the books of the bank as holding the stock as collateral. *Beal v. Essex Sav. Bank*, 67 Fed. Rep. 816 (1895). It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee," or "as collateral security," or similar words. See § 466 and ch. XXVII, *infra*.

²See ch. XXVII, *infra*.

³*Prouty v. Prouty, etc. Co.*, 155 Pa. St. 112 (1893). An unrecorded pledgee is, of course, not liable on the statutory liability. *Henkle v. Salem, etc. Co.*, 39 Ohio St. 547 (1883). See also § 258, *infra*.

⁴Where a Wisconsin corporation pledges its own stock to one of its own creditors, such creditor is not liable thereon to corporate creditors as a stockholder. *Andrews v. National Foundry, etc. Works*, 77 Fed. Rep. 774 (1897). Where the pledgees of stock from the corporation foreclose by sale, they do not thereby become

liable on the stock either to the corporation or its creditors. *Adams v. National Foundry, etc. Works*, 76 Fed. Rep. 166, 175 (1896), holding also that under the Wisconsin statute, if an issue of stock as collateral for a debt of the company is illegal, the stock is void, and the holder thereof is not liable to corporate creditors who were not especially misled by his conduct; and that persons holding stock by direct issue as collateral security for a debt of the company to them are not liable to creditors of the company as subscribers, unless they allowed themselves to be represented as shareholders to the creditors, who gave credit on the faith of that liability. Where the corporation pledges its unissued stock to one of its creditors as collateral security, he is not liable to corporate creditors who were such before the issue was made. *Gilman v. Gross*, 72 N. W. Rep. 885 (Wis., 1897). Where a corporation pledges its stock as security for a debt due from the corporation to the pledgee, and the certificates of stock state upon their face that they are full paid, the

§ 248. *The liability of an executor or administrator.*—The estate of a deceased person is liable upon the stock held and owned by the decedent in the same way and to the same extent that the shareholder was liable in his life-time. Accordingly, an executor or administrator of the estate of a deceased shareholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased.¹ The executor or administrator becomes personally liable upon the stock, if he pay away the assets of the estate in legacies without making pro-

pledgee cannot be held liable on said stock, even though the company has become insolvent. *Bloomenthal v. Ford*, [1897] A. C. 156, rev'g *Re Veuve Monnier, etc. Co.*, [1896] 2 Ch. 525. But *Furness v. Cynthiana, etc. Co.*, [1893] 21 R. 239, holds otherwise where the pledgee knew that they were not paid up.

¹The estate of a deceased stockholder is liable on the statutory liability in Wisconsin, even though the stock still stands in the name of the deceased person. The executors are not liable except to the extent of the estate. *Gianella v. Bigelow*, 71 N. W. Rep. 111 (Wis., 1897). An estate is liable on the statutory liability of a deceased stockholder in a national bank. *Wickham v. Hull*, 60 Fed. Rep. 326 (1894); *Thomas's Case*, 1 De G. & Sm. 579 (1849); *Baird's Case*, L. R. 5 Ch. App. 725 (1870), holding that the presumption is that executors of a deceased shareholder succeed to his full liability; *Thomas v. Evans*, 9 Sc. Ct. of Sess. Cas. (3d ser.) 810 (1871); *Evans v. Coventry*, 25 L. J. (Ch.) 489 (1856), holding the executor liable only to the extent of the estate funds. To same effect, *Blakeley's Case*, 13 Beav. 133 (1850); *Ex parte Gouthwaite*, 3 Mac. & G. 187 (1851); *Ex parte Doyle*, 2 Hall & T. 221 (1850); *Ex parte Hall*, 1 Mac. & G. 307 (1849); *Hamer's Case*, 2 De G., M. & G. 366 (1852); *Robinson's*

Case, 6 De G., M. & G. 572 (1856); *Ness v. Armstrong*, 3 De G. & Sm. 38, n. (1849); *Straffon's Case*, 1 De G., M. & G. 576 (1852); *Bulmer's Case*, 33 Beav. 435 (1864); *Gouthwaite's Case*, 3 De G. & Sm. 258 (1850); *Taylor v. Taylor*, L. R. 10 Eq. 477 (1870); *Alexander's Case*, 15 Sol. Jour. 788 (1871); *Hamer's Case*, 3 De G. & Sm. 279 (1850); *New England Comm. Bank v. Newport Steam Factory*, 6 R. I. 154 (1859); *Crandall v. Lincoln*, 52 Conn. 73 (1884); *Bailey v. Hollister*, 26 N. Y. 112 (1862); *Chase v. Lord*, 77 N. Y. 1 (1879); *Witters v. Sowles*, 25 Fed. Rep. 168 (1885); S. C., 32 Fed. Rep. 130 (1887), relative to the liability of an executor under the federal statute governing national banks; also *Davis v. Weed* (U. S. D. C.), 44 Conn. 569 (1877); S. C., 7 Fed. Cas. 186; *Schouler, Executors*, § 380. An administrator is not liable on national bank stock even though he is the residuary distributee of the estate. *Re Bingham*, 127 N. Y. 296 (1891). Some of the earlier Massachusetts cases are in apparent conflict with the rule declared in the text. *Child v. Coffin*, 17 Mass. 64 (1820); *Gray v. Coffin*, 63 Mass. 200 (1852); *Ripley v. Sampson*, 27 Mass. 371 (1830); *Andrews v. Callender*, 30 Mass. 484 (1833); *Dane v. Dane Mfg. Co.*, 80 Mass. 489 (1860); *Grew v. Breed*, 51 Mass. 569 (1846). See also *Re Cheshire Banking Co.*, L. R. 32 Ch. D. 301 (1886).

vision to meet the liability on the stock.¹ Where, however, the stock goes to a legatee or life tenant,² the estate may not be liable. An estate is liable for stock which the deceased owned in a national bank, and such liability may be enforced in the federal court, although the estate is still in the probate court and the time for filing claims against the estate in the probate court has expired.³ An unpaid subscription due from the estate of a deceased stockholder is a claim which should be presented to the probate court.⁴ Where the estate has been administered and distributed and the administrators discharged, the property of the estate may be followed into the hands of distributees for the purpose of paying an unpaid subscription.⁵ Executors who have inventoried national bank stock as part of the assets of the estate are liable thereon as executors.⁶ An assessment levied under the national bank act on stock held by an administrator has no preference over other debts of the estate.⁷ Where the estate of a deceased stockholder in a national bank is distributed and the stock continues to stand in his name and the bank becomes insolvent, an assessment on the stock may be collected by compelling the distributees to meet the same.⁸ Where the executor settles the estate without probate proceedings, the property of the estate may be followed to answer to the statutory liability on national bank stock standing in the name of the deceased.⁹ When the executors

¹ Taylor v. Taylor, L. R. 10 Eq. 477 (1870); Jefferys v. Jefferys, 24 L. T. Rep. 177 (1871); Thomas's Case, 1 De G. & Sm. 579 (1849), where the debts had exhausted the estate. In Stewart v. Evans, 9 Sc. Ct. Sess. Cas. (3d ser.) 810 (1871), it is held that where executors pay away the estate *bona fide*, they are not, after a lapse of sixteen years, liable personally for a deficit on shares. Cf. Witters v. Sowles, 25 Fed. Rep. 168 (1885).

² The estate is not liable on the statutory liability where the stock is transferred to the life tenant. Blackmore v. Woodward, 71 Fed. Rep. 321 (1895). See §§ 252, 560, *infra*.

³ Zimmerman v. Carpenter, 84 Fed. Rep. 747 (1898); Tourtelot v. Finke, 87 Fed. Rep. 840 (1898).

⁴ State v. Probate Court, 68 N. W. Rep. 1062 (Minn., 1896).

⁵ Lake, etc. Co. v. Lindeke, 68 N. W. Rep. 974 (Minn., 1896).

⁶ Parker v. Robinson, 71 Fed. Rep. 256 (1895). A decree that shares of stock in a national bank do not belong to an estate does not prevent another suit against another person as the owner, even though such other person was a party defendant to the first suit, being a daughter and heir of the decedent. Ricaud v. Tyson, 78 Fed. Rep. 561 (1897).

⁷ In re Beard's Estate, 50 Pac. Rep. 226 (Wyo., 1897).

⁸ Dent v. Matteson, 73 N. W. Rep. 416 (Minn., 1897).

⁹ Baker v. Beach, 85 Fed. Rep. 836 (1898). See also 87 Fed. Rep. 113.

accept a transfer in their own names they make themselves personally liable on the stock.¹ An executor who takes new shares for the estate is personally liable thereon.² A partnership association under the statutes of Pennsylvania is not a corporation to the extent that the estate of a stockholder is liable on a claim arising after the death of such stockholder.³ Statutes are often found relieving executors and administrators from this liability.⁴ A foreign executor or administrator has no absolute right to transfer the stock of the estate.⁵

§ 249. *The liability of principal and agent on stock standing in the agent's name.*—Sometimes a subscription for stock is made by one person as the agent of another, and the stock is entered on the corporate books in the name of the agent. In such a case it is the rule that corporate creditors may hold either the principal or the agent responsible on the stock.⁶ An agent who is compelled to assume and pay charges on the stock

¹ Alexander's Case, 15 Sol. Jour. 788 (1871). In New York it is held that an action to charge an executor on the stock of the estate need not be joined with an action to enforce an individual subscription by the executor. *Erie, etc. R. R. v. Patrick*, 2 Keyes, 253 (1865). A special statute of limitations applicable to executors will apply to an executor's liability on stock. *Sayles v. Bates*, 15 R. I. 342 (1886). In England an executor is liable personally on stock if he transfers it to himself; otherwise not, the title to the stock being left in the name of the testator. *Healey*, Company Law and Pr., p. 90; *Buchan's Case*, L. R. 4 App. Cas. 549 (1879).

² *Fearnside's Case*, L. R. 1 Ch. App. 231 (1866); *Spence's Case*, 17 Beav. 203 (1853); *Jackson v. Turquand*, L. R. 4 H. L. 305 (1869); *Mallorie's Case*, L. R. 2 Ch. App. 181 (1866). Cf. *Russell's Case*, 15 Sol. Jour. 790 (1871).

³ *Bodey v. Cooper*, 82 Md. 625 (1896).

⁴ See Part VII, *infra*.

⁵ See § 330, *infra*.

⁶ *Burr v. Wilcox*, 22 N. Y. 551 (1860). See also §§ 68, 69, 245, *supra*, and

§ 253, *infra*. Cf. *Grangers' Market Co. v. Vinson*, 6 Oreg. 172 (1876); *Barrett's Case*, 4 De G., J. & S. 416 (1864), where one who allowed another to use his name in registering stock as a favor, and under agreement that he should incur no liability, was held to be a contributory. A broker who has the stock transferred into his own name is liable as though he were the full owner. *McKim v. Glenn*, 66 Ind. 479 (1887). An unregistered transfer to one as agent to sell does not render such agent liable for the unpaid subscription. *Powell v. Willamette Valley R. R.*, 15 Oreg. 393 (1887); *Mann v. Currie*, 2 Barb. 294 (1848), where one who held stock in his own name, but really as an agent or broker for its sale, was held to be a stockholder at the suit of creditors. One to whom stock is issued, and in whose name it appears on the books of the corporation, is liable to the creditors of the corporation for the unpaid subscription, although he is not the owner of such stock. *Baines v. Babcock*, 95 Cal. 581 (1891).

may recover from his principal the amount so paid.¹ Where a transfer is made, not to the principal himself, but to an agent, the latter is but a nominal holder, and is subject to the rules applicable to such.

The transferee of an agent, when suit is brought by corporate creditors to enforce a demand against the stock, cannot set up that the agent had no power to transfer the stock to him. If he has received the certificates and appears as a stockholder on the books of the corporation, he is, as between himself and creditors of the corporation, a shareholder.²

It is a serious question whether so-called "dummies"—that is, persons holding in their own names stock which belongs to others, in order to enable the latter to avoid liability thereon—are not to be regarded as agents rather than trustees. This question, however, is considered elsewhere.³

§ 250. *Liability where stock is subscribed for or held by or in the names of infants and married women.*—It has already been shown that an infant cannot be held liable upon a subscription to stock,⁴ and any person subscribing for shares in the name of an infant renders himself personally liable thereon. A person buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders so as to bind themselves to the liabilities thereof.⁵ The father is liable even though the child becomes of age after the assessment has been made and ratifies the purchase of the stock.⁶ So, likewise, when shares are assigned or transferred to infants as a contrivance to escape liability, the transferrer remains liable.⁷ And this is the rule as to an infant transferee, although

¹ *Orr v. Bigelow*, 14 N. Y. 556 (1856); aff'g S. C., 20 Barb. 21 (1854); *Stover v. Flack*, 30 N. Y. 64 (1864).

² *Wakefield v. Fargo*, 90 N. Y. 213 (1882). Upon the liability of agents or trustees in these cases, see also *Crandall v. Lincoln*, 52 Conn. 73 (1884).

³ See § 253, *infra*.

⁴ See § 67, *supra*, and § 318, *infra*.

⁵ *Foster v. Chase*, 75 Fed. Rep. 797 (1896).

⁶ *Foster v. Wilson*, 75 Fed. Rep. 797 (1896).

⁷ *Capper's Case*, L. R. 3 Ch. App. 458 (1868); *Mann's Case*, L. R. 3 Ch. App. 459, n. (1867); *Weston's Case*, L. R. 5 Ch. App. 614 (1870); *Richardson's Case*, L. R. 19 Eq. 588 (1875); *Roman v. Fry*, 5 J. J. Marsh. (Ky.) 634 (1831); *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1 (1830). But see *Parsons's Case*, L. R. 8 Eq. 656 (1869), where the action of the company in continuing an infant's name, and not notifying his vendor of his infancy, was held to be such laches as to estop the offi-

the transfer was *bona fide*, and even in ignorance of the infancy of the transferee.¹ An infant who has subscribed for and paid money on stock may repudiate and recover back the money so paid, if no benefit has been received.² The infant may, however, upon attaining his majority, ratify or acquiesce in a transfer of shares to him during his infancy, and thereby render himself liable on the stock.³ The plea of infancy in these cases must, however, allege repudiation within a reasonable time after attaining majority.⁴

cial liquidator from substituting the vendor's name for that of the infant. *Curtis's Case*, L. R. 6 Eq. 455 (1868); *Reid's Case*, 24 Beav. 318 (1857); and see cases in the succeeding notes herein.

¹ *Weston's Case*, L. R. 5 Ch. App. 614 (1870); *Mann's Case*, L. R. 3 Ch. App. 459, n. (1867). Thus, a broker purchasing shares for the account of an infant was held liable as holder of the stock, not even his broker's agency availing to protect him. *Ruchizky v. De Haven*, 97 Pa. St. 202 (1881). In *Nickalls v. Merry*, L. R. 7 H. L. 530 (1875), a stock-jobber was held liable where, in a suit to recover calls on stock sold by him for the Stock Exchange, it turned out that the ultimate transferee of the shares was a minor, and his transferrer had, in consequence, been compelled to pay the calls. If three persons buy fifteen shares and take title in an infant's name, each is liable on five shares and no more. *Brown v. Black*, L. R. 8 Ch. App. 939 (1873). Where a party subscribes for stock in the name of his son, even without the consent or knowledge of the son, the party so subscribing is not liable himself thereon. *Re Britannia, etc. Assoc.*, [1891] 1 Ch. 202 (1890).

² *Hamilton v. Vaughan-Sherrin, etc. Co.*, [1894] 3 Ch. 589.

³ *Lumsden's Case*, L. R. 4 Ch. App. 31 (1868), where an infant held stock for six months. Accordingly, where an infant, after becoming of age, per-

mits his name to remain on the registry as a shareholder, he is held to have ratified the antecedent transfer to him during his minority. *Cork, etc. R'y v. Cazenove*, 10 Q. B. 935 (1847). An infant may be an incorporator, at least until he repudiates the transaction. All rights acquired prior to such repudiation are protected. *Re Laxon*, 67 L. T. Rep. 85 (1892).

⁴ *Dublin, etc. R'y v. Black*, 8 Exch. 181 (1852). *Cf. Birkenhead, etc. R'y v. Pilcher*, 5 Exch. 24 (1850). Where an infant transferee became of age fourteen months before the winding up, he was held liable as a contributory by acquiescence. *Ebbetts's Case*, L. R. 5 Ch. App. 302 (1870); *S. C.*, 18 W. R. 202 (1869). But in a case where the winding up came just before an infant transferee became of age, it was held that no affirmative repudiation was necessary, but that some distinct act of affirmation alone would avail to render him liable after majority. *Wilson's Case*, L. R. 8 Eq. 240 (1869). Where the winding up occurs just before or just after the infant transferee becomes of age, it is said that he need not expressly repudiate in order to escape liability, "because he cannot tell whether the company intends to enforce their claim against him, and therefore he is not bound, till some steps are taken, to resist his being a shareholder in the company." *Mitchell's Case*, L. R. 9 Eq. 363 (1870). It seems, also, that

What is a reasonable time within which the infant must repudiate the contract in order to escape chargeability is, in general, a question of law, and it will vary with the particular circumstances of each individual case. In general it is the rule that the transferee, on coming of age, must disaffirm promptly. Laches will bar his right to repudiate.¹

a repudiation during infancy may, under certain circumstances, avail to discharge an infant shareholder from liability to pay calls which are made after he attained the age of twenty-one years. *Newry, etc. R'y v. Coombe*, 3 Exch. 565, 578 (1849). The court said: "He became a shareholder by contract during infancy, and during infancy he disaffirmed the contract; therefore, in my opinion, he ceased to be a shareholder liable to be sued for calls." Where the infant transferee, coming of age after the winding up had been commenced, offered to affirm the contract, it was held that the liquidators might, in the interest of the creditors, refuse to accept the offer, and might instead hold the transferrer liable. *Symons's Case*, L. R. 5 Ch. App. 298 (1870); *Castello's Case*, L. R. 8 Eq. 504 (1869).

¹ In one English case we find it held that two years' delay after coming of age is a ratification of the contract. *Mitchell's Case*, L. R. 9 Eq. 363 (1870). In another case fourteen months was held sufficient. *Ebbetts's Case*, L. R. 5 Ch. App. 302 (1870). In a third case a lapse of three years was held not to amount to an affirmation of the contract. *Hart's Case*, L. R. 6 Eq. 512 (1868). In this case the infant shareholder came of age six months after the proceedings to wind up the company had been commenced. She was served with notice of these proceedings shortly before her majority. Two years after, a list of shareholders liable as contributors, which included her name, was filed, and a year later a notice of

a call was served on her. She resisted the collection of the amount of that call; and, although her resistance was made three years after she came of age, the court held that she was not liable. After a repudiation of the contract on attaining majority, it is held that rendering aid in holding the transferrer liable is not a waiver by the infant of his formal repudiation of the transfer to him of which the corporate creditors can take advantage, when for any reason they fail to make their claim against the vendor of the infant. *Baker's Case*, L. R. 7 Ch. App. 115 (1871). If a father transfers shares of stock to his minor son, though in good faith, he is, upon the winding up, liable upon the stock, as though no transfer had been attempted, if the son repudiates the transaction. *Litchfield's Case*, 3 De G. & Sm. 141 (1850); *Weston's Case*, L. R. 5 Ch. App. 614 (1870). *Cf. Roman v. Fry*, 5 J. J. Marsh. (Ky.) 634 (1831). And a director in an incorporated company, who induces his minor children to take stock in the company in their own names, is liable upon the winding up for a breach of trust, in case the children are still minors. *Ex parte Wilson*, L. R. 8 Ch. App. 45 (1872). But if a father buy shares in the name and for the benefit of his son, who is a minor, and when the transfer is made informs the broker of the vendor of the minority of the transferee, the father, upon the winding up, is not liable on the stock, but, the transferee continuing a minor when the right of action accrues, the corporate creditors may look to the trans-

No general rule can be laid down as regards the effect of a transfer of stock to a married woman. By the law of most of the states she may contract as a *feme sole* in respect to her separate estate, and may become a transferee of stock.¹ In such

ferrer. *Maitland's Case*, 38 L. J. (Ch.) 554 (1869). So also where the vendor of shares allows the certificate to be made to the minor son of his vendee, and the son upon attaining his majority repudiates the transaction, the vendor and not the vendee is liable upon the winding up. *Hennessey's Case*, 3 De G. & Sm. 191 (1850). But where a shareholder transferred to an infant, and this infant to another infant, who in his turn transferred to an adult capable of responding upon the stock, all the transfers having been duly registered, it was held that the last vendee was a contributory, and that the immediate transfers could not be avoided. *Gooch's Case*, L. R. 8 Ch. App. 266 (1872). After a winding up is commenced, a person in whose name, while an infant, stock had been placed, but who had, with knowledge, allowed the subscription to continue after he came of age, cannot repudiate. *Re Yeoland Consols*, 58 L. T. Rep. 922 (1888). It seems, therefore, that the act of the infant in transferring shares is valid and effectual to pass the title and to discharge himself from liability on the stock.

¹See § 66, *supra*, and § 319, *infra*. A woman to whom stock is transferred in the corporate books is liable on the statutory liability if she approves or acquiesces in it in any way, as by signing an application to change the charter of the bank, or by indorsing checks which are made out to her for dividends. She is estopped from denying that she knew what she was signing. It is immaterial whether new certificates were issued to her, and also whether the transfer to her was by the husband in order to con-

ceal his property. A married woman may be a stockholder in a bank in the District of Columbia, and be liable on the statutory liability. The court refused to pass on the question as to what property might be reached as against her. *Keyser v. Hitz*, 133 U. S. 138 (1890). A married woman may become a transferee of stock, and as such is liable on such stock the same as though she were unmarried. *Kerr v. Urie*, 37 Atl. Rep. 789 (Md., 1897). See also *Johnson v. Gallagher*, 3 De G., F. & J. 494 (1861); *Matthewman's Case*, L. R. 3 Eq. 781 (1866); *Luard's Case*, 1 De G., F. & J. 533 (1860); *Reg. v. Carnatic R'y*, L. R. 8 Q. B. 299 (1873). In *Angas's Case*, 1 De G. & Sm. 560 (1849), the constitution of the corporation prevented such a transfer. See also *Re Reciprocity Bank*, 22 N. Y. 9 (1860). In England the husband is liable on stock owned by his wife when he married her. *Burlinson's Case*, 3 De G. & Sm. 18 (1849); *Sadler's Case*, 3 De G. & Sm. 36 (1849); *White's Case*, 3 De G. & Sm. 157 (1850). But he is liable only for subsequent liabilities of the company. *Kluht's Case*, 3 De G. & Sm. 210 (1850). See also *Butler v. Cumpston*, L. R. 7 Eq. 16 (1868), where the wife was a *cestui que trust*. A husband has been held liable on stock which was given to his wife after their marriage by way of legacy, and was accepted by her. *Thomas v. City of Glasgow Bank*, 6 Sc. Ct. of Sess. Cas. (4th ser.) 607 (1879). One who subscribes to corporate stock for his wife, in the wife's name, is not liable on the subscription, because a married woman cannot make such a subscription; but if the subscription is for himself, although in the wife's name,

cases she would also have power to transfer her stock without the consent of her husband. A married woman is liable on national bank stock even though she purchased the stock without the consent of her husband, and the statutes of the state provided that a married woman should not be liable on a contract without such written consent.¹

§ 251. *The liability of the corporation itself as a stockholder.* When the corporation becomes the purchaser of its own stock, and the shares, as is generally the case, are transferred into the name of a trustee for the corporation, it is the rule, both here and in England, that the trustee is personally liable in respect of all the shares so standing in his name.²

it is otherwise. The fact that the husband took part of the stock in his own name and participated in the business of the company tends to show that the subscription was for his benefit. *Shields v. Casey*, 155 Pa. St. 253 (1893). Where the husband subscribes for stock in his wife's name, and she is incompetent to respond, he is liable on the stock. *National Com'l Bank v. McDonnell*, 92 Ala. 387 (1891). When a director enters stock in his wife's name, but she knows nothing of it, and he receives all dividends and votes it, she cannot be charged as a stockholder. *Longdale Iron Co. v. Pomeroy Iron Co.*, 34 Fed. Rep. 448 (1888). A married woman is herself liable for the statutory liability on stock, where she has power to be a stockholder. *Sayles v. Bates*, 15 R. I. 342 (1886); *Bundy v. Cocke*, 128 U. S. 185 (1888). A wife in whose name stock is placed without her knowledge is not liable thereon. *Washington Sav. Bank v. Butchers', etc. Bank*, 130 Mo. 155 (1895). The husband is personally liable on stock subscribed for by him in the name of his wife. *Kampmann v. Tarver*, 29 S. W. Rep. 1144 (Tex., 1895). The case of *Simmons v. Dent*, 16 Mo. App. 288 (1884), holds that under a statute whereby a married woman may become a stockholder, a transfer of

stock from the husband to the wife is valid, and relieves him from liability on the stock, the same as though he had transferred to any other person. A married woman may give away or pledge her stock. *Walker v. Joseph, etc. Co.*, 47 N. J. Eq. 342 (1890). Married women are liable on the statutory liability. *Dreibach v. Price*, 133 Pa. St. 560 (1890). A married woman is not at common law qualified to act as an incorporator nor as treasurer. *Op. Atty. Gen. (Pa.)*, 9 R'y & Corp. L. J. 197 (1891).

¹ *Robinson v. Turrentine*, 59 Fed. Rep. 554 (1894). See also *Witters v. Sowles*, 32 Fed. Rep. 767 (1887); *S. C.*, 35 Fed. Rep. 640 (1888); 38 Fed. Rep. 700; *Keyser v. Hitz*, 13 D. C. 473 (1883); *Hobart v. Johnson*, 19 Blatchf. 359 (1881); *Anderson v. Line*, 14 Fed. Rep. 405 (1880). A married woman living in Maryland, and being a stockholder in a national bank in Texas, is liable on the statutory liability, irrespective of the statutes of Texas. *Kerr v. Urie*, 37 Atl. Rep. 789 (Md., 1897).

² *U. S. Trust Co. v. U. S. F. Ins. Co.*, 18 N. Y. 199, 226 (1858); *Allibone v. Hager*, 46 Pa. St. 48 (1863); *Crandall v. Lincoln*, 52 Conn. 73 (1884). Cf. *Sanger v. Upton*, 91 U. S. 56, 60 (1875). To the same effect are the English cases. *Re St. Marylebone Banking*

The transferrer, also, if he knew that the transferee took as trustee for the corporation, is liable upon the stock.¹ But when this knowledge is not imputable to the transferrer, he is not liable.² Nor, of course, is he liable when the corporation has power, by charter or otherwise, to deal in its own shares.³

Co., 3 De G. & Sm. 21 (1849); *Re National Fin. Co.*, L. R. 3 Ch. App. 791 (1868), in which one who held shares in one company as trustee for another company was declared to be a creditor of the company for which he held the shares to the amount of the calls made upon and paid by him on account of the other company. A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. *Lewis v. Switz*, 74 Fed. Rep. 381 (1896); *Ind's Case*, L. R. 7 Ch. App. 485 (1872); *Eyre's Case*, 31 Beav. 177 (1862); *Munt's Case*, 22 Beav. 55 (1856); *Richmond's Case*, 3 De G. & Sm. 96 (1849); *Walters's Second Case*, 3 De G. & Sm. 244 (1850). The last four cases are instances of attempted transfers to trustees for the benefit of the corporation being declared void as illegal, and the original holders being declared liable. See also §§ 282, 314, *infra*. *Chapman's Case*, L. R. 3 Eq. 361 (1866), holding also that the trustee might have a right to be indemnified by the company of which he was merely a trustee. The trustee for the corporation has recourse against it for calls paid by him. *Goodson's Claim*, 28 W. R. 760 (1880). Where the company issues its stock as collateral security to notes given to it by its subscribers in payment for such stock, and then sells the notes, the stock follows the notes and may be subjected to the payment of judgment on the notes. If the corporation has issued the stock to others it must pay the judgments. *Houston, etc. R'y v. Bremond*, 66 Tex. 159 (1886).

Concerning a pledge of its own stock by a corporation, see § 465, *infra*. Where a corporation uses its profits to buy its own stock, the remaining stockholders are not liable on the statutory liability attaching to the stock so purchased by the corporation. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 35 S. W. Rep. 337 (Tex., 1896). A person who receives a certificate of stock from a company in order to enable it to organize, and immediately transfers it back to the company, is not liable on such stock as an offset to claims which he has as a creditor of the corporation. *Parberry v. Woodson Sheep Co.*, 18 Mont. 317 (1896).

¹ *Lawes's Case*, 1 De G., M. & G., 421 (1852); *Walters's Second Case*, 3 De G. & Sm. 244 (1850); *Daniell's Case*, 22 Beav. 43 (1856). Cf. *Johnson v. Laffin*, 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; S. C., 103 U. S. 800 (1880); and particularly *Crandall v. Lincoln*, 52 Conn. 73 (1884). See also § 309, *infra*.

² *Hollwey's Case*, 1 De G. & Sm. 777 (1849); *Nicol's Case*, 3 De G. & J. 387 (1859); *Johnston v. Laffin*, 103 U. S. 800 (1880).

³ *Grady's Case*, 1 De G., J. & S. 488 (1863); *Lane's Case*, 1 De G., J. & S. 504 (1863). Sometimes, by agreement between discontented stockholders and the directors of the corporation, transfers are made by such shareholders as desire to be released from their obligation as shareholders to nominees of the corporation, with the intent thereby to relieve themselves from liability upon the stock. In such cases it is held that the action of the directors in permitting or

Where the owner of stock transfers it directly to the corporation itself, without the intervention of a trustee, the transferor is not released from his liability on the stock, but remains as fully chargeable as though no transfer had been attempted.¹

§ 252. *The liability of legatees, assignees in insolvency, joint owners, and of a corporation owning stock in another corporation.*—A legatee of shares of stock may, of course, if he thinks proper, decline to receive his testator's gift. But if he accepts the legacy, it is well settled that, as specific legatee, he is bound to pay all calls made upon the stock after the death of the testator.² He must also pay all calls voted before, but not due and payable in the regular course of business until after, the testator's death.³

It has been held that an assignee of the estate of a bankrupt is not liable, personally or as assignee, upon the bankrupt's shares of stock. He is not bound, as assignee, to accept as part of the estate property of this nature, when it is of an onerous or unprofitable character.⁴

sanctioning such a transfer was *ultra vires*, and that in consequence the transferor is still liable. *Morgan's Case*, 1 De G. & Sm. 750 (1849); *Bennett's Case*, 5 De G., M. & G. 284 (1854); *Addison's Case*, L. R. 5 Ch. App. 294 (1870); *Nathan v. Whitlock*, 9 Paige, 152 (1841). See also §§ 253, 309, 310, *infra*.

¹ *Re Reciprocity Bank*, 22 N. Y. 9 (1860); *Currier v. Lebanon Slate Co.*, 56 N. H. 262 (1875); *Walters's Second Case*, 3 De G. & Sm. 244 (1850); *Glenn v. Scott*, 28 Fed. Rep. 804 (1886). Compare *Zulueta's Claim*, L. R. 5 Ch. App. 444 (1870); *Addison's Case*, L. R. 5 Ch. App. 294 (1870). Subscribers whose stock is taken back by the corporation may be liable thereon at common law or by statute relative to transfers. *Alling v. Wenzel*, 133 Ill. 264 (1890). See §§ 167-171, *supra*.

² *Day v. Day*, 6 Jur. (N. S.) 365 (1860). Cf. *Witters v. Sowles*, 25 Fed. Rep. 168 (1885). See also § 248, *supra*.

³ *Addams v. Ferick*, 26 Beav. 384 (1859). For a more complete state-

ment of the law relative to legacies of stock, see ch. XVIII, *infra*.

⁴ *American File Co. v. Garrett*, 110 U. S. 288 (1883); *Amory v. Lawrence*, 3 Cliff. 523 (1872); S. C., 1 Fed. Cas. 778; and see *Rugely v. Robinson*, 19 Ala. 404 (1851); *Streeter v. Sumner*, 31 N. H. 542 (1855); *Ex parte Davis*, L. R. 3 Ch. D. 463 (1876); *Furdoonjee's Case*, L. R. 3 Ch. D. 268 (1876), holding that the liability upon shares, not being a debt provable in insolvency proceedings, is not barred by the order of discharge. And where a corporation itself assigned shares of its own stock to an assignee for the benefit of corporate creditors, it was held that the assignee was not liable, personally or as assignee, thereon. *Re City Terminus Hotel Co.*, L. R. 14 Eq. 10 (1872). It has been held that one who makes an assignment for the benefit of creditors is thereby released from liability on stock, even though the transfer has not been recorded in the corporate books. *Sayles v. Bates*, 15 R. I. 342 (1886).

Upon the death of one who is joint owner with another or others of shares of stock, the liability thereon attaches only to the surviving owners, and the estate of the deceased owner cannot be charged.¹

Where a national bank invests its money in the stock of a savings bank the investment is *ultra vires*, even though the savings bank becomes insolvent. The national bank is not liable on the statutory liability attached to such savings bank stock, even though the national bank received dividends on the stock.² But a national bank which has purchased from a third party shares of stock in another national bank as an investment, and which appears on the books of the latter bank as a stockholder, is estopped, after the latter's failure, to deny liability to an assessment on the stock on the ground that its purchase thereof was *ultra vires*.³

§ 253. *The use of "dummies" and transfers to nominal and fictitious persons.*—Frequently it happens that persons purchasing or subscribing for stock do not wish to take the stock in their own names, inasmuch as they thereby incur liability, or make known to the public the fact that they are stockholders. Accordingly, it is the custom in such cases to have the stock taken or purchased in the names of other persons. These latter are called "dummies."⁴ The law is well settled that

¹ *Re Maria Anna, etc. Co.*, 44 L. J. (Ch.) 423 (1875); *Hill's Case*, L. R. 20 Eq. 585 (1875).

² *California Bank v. Kennedy*, 167 U. S. 362 (1897). See 52 Pac. Rep. 1071.

³ *First Nat. Bank v. Hawkins*, 79 Fed. Rep. 51 (1897). A state bank may be held liable on the statutory liability on national bank stock which the former has purchased, even though the purchase is *ultra vires*. *Citizens' State Bank v. Hawkins*, 71 Fed. Rep. 369 (1896). So also as to an insurance company holding such stock. *Cooper Ins. Co. v. Hawkins*, 71 Fed. Rep. 372 (1896). The case of *First Nat. Bank v. Hawkins*, 82 Fed. Rep. 301 (1897), holds that the *California Bank case*, *supra*, does not apply to a case where a national bank is a stockholder in another na-

tional bank. A national bank is liable on stock of a corporation organized for improving real estate. *Western Imp. Co. v. Des Moines Nat. Bank*, 72 N. W. Rep. 657 (Iowa, 1897). A jewelry corporation that has sold goods and taken in payment stock of a park corporation cannot avoid liability on said stock on the ground that it had no power to acquire it. *White v. Marquardt*, 70 N. W. Rep. 193 (Iowa, 1897); also 74 id. 930. A bank may buy the stock of another bank under the express power of the former to discount securities, and as a stockholder is liable on the stock. *Latimer v. Citizens' State Bank*, 71 N. W. Rep. 225 (Iowa, 1897).

⁴ The cases in this section refer to the use of "dummies" without the real owner appearing at all on the

such a "dummy" is liable on the stock to the corporation and corporate creditors to the same extent that he would be if he were the real owner of the stock.¹ Where stock stands in the name of a person as "trustee," he is liable thereon even though he is acting merely as the agent of another person.² Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate of stock book that it had been transferred to him, and sends him dividends, he is liable thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the national bank act.³

Although stock stands in the name of a person who is not the real owner, yet, where judgment has been taken against the real owner, the nominal holder cannot be held liable.⁴ The real owner of stock is liable to repay to his "dummy" any sum of money which the latter has paid to the corporation or the corporate creditors.⁵ An attachment against the "dummy" may take the stock.⁶ The law relative to the use of dummies is in

corporate books as a stockholder. These cases differ from those where stock is transferred by a stockholder from himself to a "dummy" or to an irresponsible person. See §§ 263-266, *infra*.

¹ Wakefield v. Fargo, 90 N. Y. 213 (1882); *Re Reciprocity Bank*, 22 N. Y. 9 (1860); Barrett's Case, 4 De G., J. & S. 416 (1864); Bugg's Case, 2 Dr. & Sm. 452 (1865). *Cf.* Fox v. Clifton, 6 Bing. 776 (1830). A transfer of stock on the books to a director renders him liable on the statutory liability, even though the transfer was to render him eligible for office, and he was unaware of the transfer, and had paid the dividends to the transferrer. As director he was bound to know. Brown v. Finn, 34 Fed. Rep. 124 (1888).

² Wadsworth v. Laurie, 164 Ill. 42 (1896). See also § 249, *supra*.

³ Horton v. Mercer, 71 Fed. Rep. 153 (1895). Where the statute prescribes that only *bona fide* stockholders shall

vote, a stockholder of record who is really a dummy for the real owner, in order to enable the latter to avoid the statutory liability, cannot vote. Smith v. San Francisco, etc. R'y, 115 Cal. 584 (1897).

⁴ Yardley v. Wilgus, 56 Fed. Rep. 965 (1893).

⁵ This is the rule whether the relation of the real owner be considered that of a principal towards an agent (see § 249, *supra*), or that of a *cestui que trust* towards a trustee (see § 245, *supra*).

⁶ White v. Rankin, 90 Ala. 541 (1890). Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequently attached for a debt of such agent or trustee and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value

many respects similar to the law where stock stands in the name of an agent—a subject considered elsewhere.¹

A difficult question arises when an attempt is made to hold the real owner of the stock liable to the corporation or corporate creditors. Where the real owner was formerly the registered stockholder, but has transferred his stock to an irresponsible person, a class of cases is found which is considered elsewhere.²

A different class of cases, however, is now under consideration, and in America it has been held, where a person purchased stock in a national bank, but had it transferred, not to himself, but to another person, a “dummy,” that the real owner of the stock is liable thereon, although he never appeared on the corporate books as a stockholder.³

of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship. *Hovey v. Bradbury*, 112 Cal. 620 (1896).

¹ See § 249, *supra*.

² See §§ 263–266, *infra*.

³ Where the real owner of stock in a national bank transfers it to another person, or causes it to be placed in the name of another person to avoid the liability to creditors under the national bank act, such real owner may be held liable on such stock. *Pauley v. State, etc. Co.*, 165 U. S. 606 (1897); *Davis v. Stevens*, 17 Blatchf. 259 (1879); S. C., 7 Fed. Cas. 177, where the question was “whether, in an action at law by a receiver of the bank, the real owner of stock in a national bank, standing by his procurement in the name of another, and *never having been in his own name on the books*, can be charged as a shareholder with the statutory liability for debts?” *Held*, that the real owner is liable. “Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal.” See, also, to same effect, *Case v. Small*, 10 Fed. Rep. 722 (1881).

Where a subscription is by “C. F. White, as trustee,” he being merely an agent, the undisclosed principals may be held liable thereon. *Cole v. Satsop, etc. Co.*, 9 Wash. 487 (1894). A person obtaining stock through another and paying calls on it is liable on the subscription. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462 (1894). In England, under its statutes, a different rule prevails. See *King’s Case*, L. R. 6 Ch. App. 196 (1871); *Williams’s Case*, L. R. 1 Ch. D. 576 (1875); *Fenwick’s Case*, 1 De G. & Sm. 557 (1849); *Cox’s Case*, 4 De G., J. & S. 53 (1863). The real owner of stock is likewise liable where he transfers it from his own name to that of an irresponsible person. §§ 263–266, *infra*. Cf. cases in note 6, p. 481, *supra*. An undisclosed owner of stock, standing in the name of another as trustee, is liable on the statutory liability. *Borland v. Haven*, 37 Fed. Rep. 394 (1888); *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1 (1830), holding that one who subscribed for stock in the name of an infant for the purpose of avoiding responsibility, and who enjoyed the benefits of the stock, was individually responsible as a stockholder for debts of the

In England a directly contrary rule prevails.¹

In America the relation of the real owner to the "dummy" is held to be that of principal and agent, and the principal is held liable, on the ground that an undisclosed principal is liable on the contracts of his agent. In England the real owner of the stock is looked upon as a *cestui que trust*, and hence is not liable.² Where the real owner of all the stock of a company, none of which has been paid up, holds the same in the name of a person who is practically a dummy, and the real owner holds the stock as "pledgee," he is liable on the subscription price, even though the stock stands in his name on the corporate books as "pledgee." "A stockholder cannot escape liability by the use of the name of a dummy."³ Under the Ohio statute

corporation. Where the "dummy" dies, and his representatives claim the stock, and they pay the real owner a small sum in settlement, the compromise will be upheld. *Antoine v. Smith*, 40 La. Ann. 560 (1888). Where the "dummy" dies and is insolvent, the stock cannot be reclaimed by the real owner. *Hirsch v. Norton*, 115 Ind. 341 (1888). Stock held in the name of a "dummy" is subject to his debts, even though he notified the secretary of the company that he held it in trust. *Ex parte Ord*, 2 Mont. & A. 724 (1835); *Ex parte Watkins*, 2 Mont. & A. 348 (1835), reversing 1 Mont. & A. 689. A person subscribing for stock in the name of another, without the knowledge of the latter, is liable himself thereon. *Barron v. Burrill*, 86 Me. 72 (1893). See 86 Fed. Rep. 547.

¹ *King's Case*, L. R. 6 Ch. App. 196 (1871), where the court says it does not know upon what ground a court, "setting aside a transaction as fraudulent, is able to make a new contract for persons which they have never made themselves." *Cox's Case*, 4 De G., J. & S. 53 (1863), is distinguished on the ground that Cox had agreed to take certain shares, and the decision was in the nature of specific performance. In *Cox's Case*, also, he

had, by the use of "dummies," entrapped the public into believing that many persons were investing. In *Williams's Case*, L. R. 1 Ch. D. 576 (1875), where a purchaser of shares had them transferred to one of his employees, the real owner was held not liable thereon. In the case *Ex parte Bugg*, 2 Dr. & Sm. 452 (1865), a similar conclusion was arrived at, the court saying that the relation between the real owner and the "dummy" was that of *cestui que trust* and trustee. Such, also, is the rule laid down in *Fenwick's Case*, 1 De G. & Sm. 557 (1849), where the purchaser had the stock transferred into the name of the "dummy" as "trustee." A person who subscribes for stock in a Canadian corporation in the name of another, a "dummy," is not liable for the unpaid subscription. *Molson's Bank v. Boardman*, 47 Hun (N. Y.), 135 (1888). That a *cestui que trust* is not liable on stock held by his trustee, see §§ 245, 246, *supra*. See also cases in note 4, p. 476.

² See cases in the preceding note.

³ *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895). The owner of a certificate of stock not paid up is liable thereon to corporate creditors although such owner never appeared as such on the

the word "stockholders" applies to persons owning stock in the name of another, as well as to persons appearing on the corporate books as stockholders.¹

A transfer to a fictitious person is void, and leaves all parties as they were.²

corporate books. *White v. Marquardt & Sons*, 74 N. W. Rep. 930 (Iowa, 1898).

¹ *Lloyd v. Preston*, 146 U. S. 630 (1892); 74 N. W. Rep. 937.

² *Arthur v. Midland R'y*, 3 Kay & J. 204 (1857). See *Pugh & Sharman's Case*, L. R. 13 Eq. 566 (1872), where the transfer was to a married woman, but the court treated it as a transfer to a fictitious person. In *Muskingum, etc. Co. v. Ward*, 13 Ohio, 120 (1844), where the transfer was made to a fictitious person, the court held that

the transaction was a mere nullity, and that it could not be regarded as an abandonment of the stock. So where one purchased, or assumed to purchase, shares for an infant, and gave the name of the infant but did not disclose the infancy, it was held that by such a transaction the purchaser did not become liable upon the shares, nor was the vendor released. *Maitland's Case*, 38 L. J. (Ch.) 554 (1869). See also *Richardson's Case*, L. R. 19 Eq. 588 (1875).

CHAPTER XV.

LIABILITY AS AFFECTED BY TRANSFERS.

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| <p>§ 254. The subject herein.</p> <p>255. Liability of the transferrer on unpaid subscriptions after registry.</p> <p>256. Liability of the transferee on unpaid subscriptions after registry.</p> <p>257. Knowledge that the shares are not fully paid up, how far imputable to a transferee.</p> <p>258. Liability on subscription after transfer but before registry — Irregular and attempted transfers.</p> | <p>§ 259. Does the statutory liability attach when the corporate debt is contracted, or is due, or is sued upon?</p> <p>260. Transferrer's statutory liability after transfer but before registry.</p> <p>261. The transferee's statutory liability.</p> <p>262. Liability of transferee to transferrer.</p> <p>263-266. A transfer to a "dummy" or to an insolvent person in order to escape liability.</p> |
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§ 254. *The subject herein.*— When shares of stock are transferred from one owner to another, it at once becomes an important matter to determine who is liable upon unpaid subscriptions, and who is liable on a liability imposed by statute. The difficulty is increased by the rule of law that no transfer is complete until it is duly entered or recorded in the transfer book of the corporation. The complication is usually greatest in cases involving the question of statutory liability, since generally each case turns more or less upon the particular words of the statute by which the liability is imposed. There are, however, many rules which are general in their character and application, governing the liability of shareholders as affected by transfer, and these are the subject of this chapter.

§ 255. *Liability of the transferrer on unpaid subscriptions after registry.*— Transfers of shares may be made at any time after the contract of subscription is made, and before any part or after a part of the subscription price has been paid. The well-established and general rule of law is, that where a stockholder makes an absolute transfer of his stock in good faith, and the transfer is duly recorded in the corporate stock book, the transferrer is thereby wholly discharged from all further liability upon the uncalled subscription price of the stock.¹

¹ *Huddersfield Canal Co. v. Buck*; *Gilmore v. Bank of Cincinnati*, 8 ley, 7 T. R. 36 (1796), by Lord Kenyon; *Ohio*, 62, 71 (1837). A transferrer is

This important rule is peculiar to corporation law. It is based on public policy and an appreciation of the demands of trade. A stockholder has a right to sell his stock and have it transferred on the corporate books, although there are un-

not liable on an unpaid subscription. "A transfer of stock made in good faith, and at a time when the corporation is a going and solvent concern, and which is entered upon the books, would certainly relieve the transferrer from all of the responsibilities which attached to him as a stockholder." *Tucker v. Gilman*, 121 N. Y. 189 (1890); *Billings v. Robinson*, 94 N. Y. 415 (1884), affirming S. C., 28 Hun, 122 (1882); *Wakefield v. Fargo*, 90 N. Y. 213 (1882); *Cowles v. Cromwell*, 25 Barb. 413 (1857); *Cole v. Ryan*, 52 Barb. 168 (1868); *Isham v. Buckingham*, 49 N. Y. 216 (1872); *Stewart v. Walla Walla, etc. Co.*, 1 Wash. St. 521 (1889); *Miller v. Great Republic Ins. Co.*, 50 Mo. 55 (1872); *Allen v. Montgomery R. R.*, 11 Ala. 437, 451 (1847); *Haynes v. Palmer*, 13 La. Ann. 240 (1858); *Weston's Case*, L. R. 4 Ch. 20 (1868); *McKenzie v. Kittridge*, 24 U. C. (C. P.) 1 (1874). The mere fact that the transferrer, after the registry, paid a call does not estop him from denying his liability for subsequent calls. *Provincial Ins. Co. v. Shaw*, 19 U. C. (Q. B.) 533 (1860). It is not necessary to the validity of the transfer that there should be a consideration moving from transferee to transferrer; and so, where one gives his share away absolutely and in good faith, the same rule as to liability prevails. *Re European Bank, Master's Case*, 41 L. J. (Ch.) 501 (1872). Neither does it alter the rule that no certificates of stock have been issued. In such a case the transferee becomes liable on the stock, and the transferrer's liability is at an end. *Burke v. Smith*, 16 Wall. 390 (1872); *Brigham v. Mead*, 92 Mass. 245 (1865). See also *First*

Nat. Bank v. Gifford, 47 Iowa, 575, 583 (1877); *Isham v. Buckingham*, 49 N. Y. 216 (1872). As regards the rule where the transfer is made before the corporation is organized, see § 62, *supra*.

In Pennsylvania, after considerable doubt and conflict, it has been clearly stated by the supreme court that the transferee of stock is liable on the unpaid subscription. *Bell's Appeal*, 115 Pa. St. 88 (1887); *Citizens', etc. Co. v. Gillespie*, 115 Pa. St. 564 (1887), where, however, the transferee directly contracted to pay. But compare *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Pa.) 198 (1838); *Aultman's Appeal*, 98 Pa. St. 505 (1881); *Bunn's Appeal*, 105 Pa. St. 49 (1884); *Palmer v. Ridge Min. Co.*, 34 Pa. St. 288 (1859); *Pittsburgh, etc. Co. v. Otterson*, 4 W. N. Cas. 545 (1877); *Delaware Canal Co. v. Sansom*, 1 Binn. (Pa.) 70 (1803); *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227 (1867). And, in general, as regards the Pennsylvania General Railroad Act of Feb. 19, 1849, see *Pittsburgh, etc. R. v. Clarke*, 29 Pa. St. 146 (1857); *Graff v. Pittsburgh, etc. R. R.*, 31 Pa. St. 489 (1858). *Cf. Franks Oil Co. v. McCleary*, 63 Pa. St. 317 (1869), holding that the transferee in a mining company is not liable. *Messersmith v. Sharon Savings Bank*, 96 Pa. St. 440 (1880), to same effect; and see *Aultman's Appeal*, 98 Pa. St. 505 (1881), involving an Ohio corporation; *Pittsburgh, etc. Co. v. Otterson*, 4 W. N. Cas. 545 (1878); *Provincial, etc. Co. v. Shaw*, 19 Q. B. Rep. (Can.) 533 (1860); *Miller v. Peabody Bank*, 15 W. N. Cas. 76 (1883); *Reimer, etc. Co. v. Rosenberger*, 40 Leg. Int. 381 (1883); *Pittsburgh, etc.*

paid calls due on the stock at the time of transfer, and for refusal to transfer he may sue for conversion.¹ A transferrer may be released, although the corporate officers enter the transfer against a protest.² The transferrer, however, is liable for calls payable before the registry is made,³ and in some cases for calls made before, but payable after, the registry.⁴ Frequently the statutes of the state change these common-law rules and provide that both the transferrer and transferee shall be liable.⁵ Although the company may allow a transfer of

R. R. v. Clarke, 29 Pa. St. 153 (1857). After a transfer and registry the stockholder is not liable on the subscription. *Libby v. Tobey*, 82 Me. 397 (1890). In California railroad stock cannot be issued until it is fully paid up. *Brewster v. Hartley*, 37 Cal. 15 (1869). In Tennessee it is held that, upon a valid transfer, the transferrer is released, not only upon his liability for unpaid subscriptions, but also as to all the existing debts of the corporation; and this is the general rule. *Jackson v. Sligo Mfg. Co.*, 1 Lea (Tenn.), 210 (1878). So in Alabama. *Allen v. Montgomery R. R.*, 11 Ala. 437 (1847).

¹ *Craig v. Hesperia, etc. Co.*, 113 Cal. 7 (1896). On this subject, see also §§ 520, 521, *infra*.

² *London, etc. R'y v. Fairclough*, 2 Man. & G. 674, 706 (1841); *Upton v. Burnham*, 3 Biss. 520 (1873); S. C., 28 Fed. Cas. 833; *Webster v. Upton*, 91 U. S. 65 (1875). In a proceeding in equity a transferee will be compelled to pay calls made after transfer of the certificate and before registry of the same. *Webster v. Upton*, 91 U. S. 65 (1875).

³ *Vicksburg, etc. R. R. v. McKeen*, 14 La. Ann. 724 (1859). The transferrer is liable where the transfer was made on the books after the assessment on the stock had been made. *Visalia, etc. R. R. v. Hyde*, 110 Cal. 632 (1895), and cases in this section generally, and § 258, *infra*.

⁴ *North American, etc. Assoc. v.*

Bentley, 19 L. J. (Q. B.) 427 (1850); *Schenectady, etc. Co. v. Thatcher*, 11 N. Y. 102, 113 (1854). *Contra*, *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Pa.) 198 (1838). But this case was decided on the ground that the transferee had not accepted the stock, and could not be held liable by the corporation. *Cf. Aylesbury R'y v. Mount*, 4 Man. & G. 651 (1842), reversing 5 Scott, N. R. 127; *Re Hoylake R'y*, L. R. 9 Ch. 257 (1874).

⁵ Under the Nebraska constitution both the transferrer and transferee are liable for the unpaid subscription price to corporate creditors. *Com'l Nat. Bank v. Gibson*, 37 Neb. 750 (1893). Where both transferrer and transferee are liable by statute, one may be sued after the other has been. *Glenn v. Hunt*, 120 Mo. 330 (1894). In Virginia, see *Glenn v. Scott*, 28 Fed. Rep. 804 (1886); *McKim v. Glenn*, 66 Md. 479 (1887). In Pennsylvania and Virginia both the transferrer and transferee are liable. *Glenn v. Foote*, 36 Fed. Rep. 824 (1888); *Priest v. Glenn*, 51 Fed. Rep. 400 (1892); *Hamilton v. Glenn*, 85 Va. 901 (1889). Subscribers to stock are liable according to the law of the state incorporating the company, and not according to the law of the state where the subscribers reside. A subscriber to stock in a Virginia corporation is liable by statute although he has transferred his stock. *Morris v. Glenn*, 7 S. Rep. 90 (Ala., 1888). In Maryland the ordinary statutory provision holding

stock after liquidation proceedings have been commenced, yet the transferor is not thereby released from his subscription liability.¹

§ 256. *Liability of the transferee on unpaid subscriptions after registry.*—When a transfer of stock is made, and the transfer is duly recorded in the corporate stock-book, the transferee thereupon becomes liable for any balance of the subscription price uncalled and unpaid at the time of the transfer. The transfer releases the transferor and charges the transferee.²

stockholders liable until the capital stock is fully paid in is held to render the shareholder liable, even though he has transferred his shares. *Hager v. Cleveland*, 36 Md. 476 (1872). Where the statute makes the transferor liable for the unpaid subscription in case the transfer is to defraud corporate creditors, another statute making transferors liable if the transferees do not pay is construed to apply only to cases of fraudulent transfer. *Re People's Live-stock Ins. Co.*, 56 Minn. 180 (1894).

¹ *Re National Bank of Wales*, [1896] 2 Ch. 851. After a winding up has been commenced and a receiver been appointed, the court may allow transfers of the stock, but in case calls have to be made subsequently on said stock a transferor is liable in case the transferee does not pay. *Re National Bank of Wales*, [1897] 1 Ch. 298.

² *Webster v. Upton*, 91 U. S. 65 (1875); *Pullman v. Upton*, 96 U. S. 328 (1877); *Upton v. Hansbrough*, 3 Biss. 417 (1873); S. C., 28 Fed. Cas. 839; *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484 (1847); *Visalia, etc. R. R. v. Hyde*, 110 Cal. 632 (1895); *Bend v. Susquehanna Bridge Co.*, 6 Har. & J. (Md.) 128 (1823); *Merrimac Min. Co. v. Bagley*, 14 Mich. 501 (1866); *Brigham v. Mead*, 92 Mass. 245 (1865); *Hartford, etc. R. R. v. Boorman*, 12 Conn. 530 (1838); *Moore v. Jones*, 3 Woods, 53 (1877); S. C., 17 Fed. Cas. 690; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227 (1867); *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36

(1796). Where an assessment is made on the same day that a purchaser of stock takes his certificate, he is liable to the company for the assessment. *San Gabriel, etc. Water Co. v. Dennis*, 34 Pac. Rep. 441 (Cal., 1893). A transferee is liable although he took the stock as a gift, and did not know why it was given him, and never agreed to pay for it. *Tuthill Spring Co. v. Smith*, 90 Iowa, 331 (1894). A duly recorded transferee is liable on the unpaid subscription, even to a creditor who was a creditor before the transfer of the stock was made. *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa, 147 (1895). It is no defense that the obligation for which the assessment is made was incurred before the stockholder purchased his stock. *Visalia, etc. R. R. v. Hyde*, 110 Cal. 632 (1895). In *Gray's Case*, L. R. 1 Ch. D. 664 (1876), where an owner of iron-works sold them to a corporation for its stock, and guaranteed that the net dividends should be not less than ten per cent on the paid-up capital, for which purpose the shares given as consideration were vested in trustees, but were not to be registered in their names except by their own direction, it was held that they were not liable as stockholders because they had not elected to be registered as stockholders. When a person purchases shares of a company, he, as between himself and other shareholders, takes those shares with all the rights and liabilities attaching

Where a person makes an executory agreement to purchase a certain amount of stock when it is issued to the vendor, the subscription price being unpaid to the corporation, and the purchaser subsequently refuses to fulfill, the remedy against him is an action by the vendor for breach of contract.¹

A person who buys stock at an execution sale thereof and takes the sheriff's certificate therefor, and presents the same to a corporation for transfer, thereby becomes a stockholder to the extent at least of being liable for any unpaid part of the subscription price of such stock.²

In Pennsylvania³ and some other states, the liability of the transferee is regulated by statute. Where, by statute or a by-law of the corporation, no valid transfer can be made while there are calls due and unpaid, it is held that a transfer without such payment will not render the transferee liable thereon.⁴

§ 257. *Knowledge that the shares are not fully paid up, how far imputable to a transferee.*—The question whether the pur-

to them, so that his co-shareholders have a perfect right to insist upon his contributing with them towards the liquidation of debts contracted before he joined the company. *Taylor v. Hill*, 1 N. R. 566 (1863), V.-C. W.; *Cape's Case*, 2 De G., M. & G. 562 (1852); *Mayhew's Case*, 5 De G., M. & G. 837 (1854). See, too, *Horsley v. Bell*, Amb. 769 (1778), cited in 1 Bro. Ch. 101, n. *Sanderson's Case*, 3 De G. & S. 66 (1849), cannot be regarded as correct on this point. See *Henderson v. Sanderson*, 3 H. L. Cas. 698 (1852).

¹ Even though the vendor transfers the stock on the corporate books to the vendee, the vendee is not liable to the corporation, inasmuch as no specific stock was designated in the contract of sale and the vendee did not acquiesce in the transfer. The rule allowing the vendor to transfer the stock on the corporate books does not apply to such a case. *Greene v. Sigua, etc. Co.*, 76 Fed. Rep. 947 (1896).

² *Basting v. Northern Trust Co.*, 61 Minn. 307 (1895). And is also liable

on the statutory liability attaching to such stock. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896). A dictum in *Sturges v. Stetson*, 1 Biss. 246 (1858); S. C., 23 Fed. Cas. 311, says that the purchaser at execution sale is liable on unpaid subscription the same as his debtor was. A person who buys stock at an execution sale, after it has already been pledged for its full value to others and a transfer to them made, is not liable for calls on the stock, even though such pledgees transferred it to him without his knowledge. *Simmons v. Hill*, 96 Mo. 679 (1888).

³ See notes to the preceding section; also Part VII, *infra*.

⁴ *Watson v. Eales*, 23 Beav. 294 (1856). *McCready v. Rumsey*, 6 Duer, 574 (N. Y. Super. Ct., 1857), was a case under a prohibition against transfer in a bank organized under the New York General Banking Act of 1838. *Re Bachman*, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310, where the corporation had a lien on the stock.

chaser of shares is bound to take notice that the stock he purchases is not fully paid for is a serious and complicated one. The better opinion, and the one most in accord with the usages and demands of trade, is that, where one buys stock in open market, in good faith, and without notice that the subscription price thereof has not been paid up, such a purchaser cannot be held liable to pay the unpaid balance of subscription.¹

§ 258. *Liability on subscription after transfer but before registry — Irregular and attempted transfers.*— Until a transfer is recorded in the transfer book of the corporation, the transferee, not being duly recognized as a stockholder, is not chargeable either with corporate debts or unpaid balances of the subscription. He is bound to protect and indemnify his transferrer, but he is not liable to the corporation or corporate creditors or other stockholders.²

The general rule is that the transferrer is not released from liability until the transfer is duly registered in the corporate books.³ This rule, however, is subject to an important excep-

¹ Certificates of stock have become such important factors in trade and credit, and general investment by all classes, that the law is steadily tending towards the complete protection of a *bona fide* purchaser of them in open market, and without notice of facts which will decrease the apparent value of the stock. The constant tendency of the courts to increase the negotiability of certificates of stock will probably establish the rule that the purchaser in good faith of a certificate of stock is not liable on any unpaid subscription price thereof, unless such liability is stated on the face of the certificate itself. Indeed, even now this may be said to be the established rule. See § 50, *supra*. Where a member has not paid for his stock in full and sells it as though it was full paid, he must refund to the transferee the balance which the transferee is obliged to pay. *Jamison v. Harbert*, 87 Iowa, 186 (1893). But where a subscription is not paid, and the stock is transferred to the corporation as "treasury stock" and then

sold below par, the purchaser is liable for the unpaid par value. *Alling v. Wenzel*, 133 Ill. 264 (1890). A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. *Williams v. Evans*, 87 Ala. 725 (1889). A transferee of stock, the certificates reciting on the face thereof that a certain amount is still due, is liable therefor. *Glenn v. Porter*, 73 Fed. Rep. 275 (1896).

² *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579 (1818); *Topeka Mfg. Co. v. Hale*, 39 Kan. 23 (1888); *Midland, etc. Ry v. Gordon*, 16 M. & W. 804 (1847). *Cf. McDowell v. Sheehan*, 129 N. Y. 200, 207 (1891). In Indiana it has been held that a statute will not be construed so as to make both transferrer and transferee liable directly for the same indebtedness. *Williams v. Hanna*, 40 Ind. 535 (1872).

³ *Shellington v. Howland*, 53 N. Y. 371 (1873); *Barron v. Burrill*, 86 Me.

tion; and this exception is that, where the corporation accepts the transferee as a stockholder and pays dividends to him, or where, through the negligence or fault of the corporation, no transfer on the books is made, in such cases the transferor is released, and the transferee only is liable on the stock, although the stock still stands on the corporate books in the name of the transferor.¹

Where the transferor signs the transfer on the back and delivers the same to his broker, who sells the stock and then presents the certificate to the corporation for transfer, and the corporation agrees so to do, but neglects to do for a year, the transferor is not liable on the stock.² The transferor of stock in a national bank is released from liability when he goes with the transferee to the bank, delivers the old certificate duly transferred, and leaves the same for registry, even though no registry is made.³ But a delivery of certificates of stock to the president as vendee, and not as president, is not such an attempt to transfer the stock on the books as relieves the trans-

72 (1893); *Worrall v. Judson*, 5 Barb. 210 (1849); *Louisiana Ins. Co. v. Gordon*, 8 La. Rep. 174 (1835); *Dane v. Young*, 61 Me. 160 (1872); *Fowler v. Ludwig*, 34 Me. 455 (1852); *Davis v. Essex Bapt. Soc.*, 44 Conn. 582 (1877); *Kellogg v. Stockwell*, 75 Ill. 68 (1874); *Bowden v. Farmers', etc. Bank*, 1 Hughes, 307; S. C., 3 Fed. Cas. 1029 (1877); *London, etc. Ry v. Fairclough*, 2 Man. & G. 674 (1841). To the same effect, *McEuen v. West London Wharves, etc. Co.*, L. R. 6 Ch. 655 (1871), in which it was held that the sale and transfer by delivery of scrip certificates allotted and issued to a subscriber, entitling the bearer to exchange them for share certificates, would not exonerate the vendor from liability for calls, even though the vendee had paid some calls; *Midland, etc. Ry v. Gordon*, 16 M. & W. 804 (1847); *Sayles v. Blane*, 19 L. J. (Q. B.) 19 (1849). See also *Hawkins v. Glenn*, 131 U. S. 319 (1889). The registered stockholder is liable on the

subscription. *Baines v. Babcock*, 95 Cal. 581 (1892). An original subscriber for stock is not released from his obligation although he sells and transfers the certificate of stock, such transfer not having been recorded on the corporate books. *Hood v. McNaughton*, 54 N. J. L. 425 (1892). A person sued as a subscriber cannot set up that he subscribed at the solicitation of another person who agreed to take the subscription off his hands at once. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890); reversed on other grounds, 139 U. S. 417.

¹ *Isham v. Buckingham*, 49 N. Y. 216 (1872); *Cutting v. Damerel*, 88 N. Y. 410 (1882); *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120 (1849); *Murray v. Bush*, L. R. 6 H. L. 37 (1873); *Upton v. Burnham*, 3 Biss. 431, 520 (1873); S. C., 28 Fed. Cas. 831, 833.

² *Young v. McKay*, 50 Fed. Rep. 394 (1892).

³ *Hayes v. Shoemaker*, 39 Fed. Rep. 319 (1889).

ferrer from liability.¹ Where there is no transfer book, but certificates are merely canceled and new ones issued, this is sufficient to effect a transfer on the corporate books.² Various other illustrations of the general rule are given in the notes below.³

¹ *Richmond v. Irons*, 121 U. S. 27 (1887).

² *Plumb v. Bank of Enterprise*, 48 Kan. 484 (1892). Where there is practically no book except the certificate-of-stock book, and a purchaser of stock at execution sale sends the certificate to the company for transfer, which is refused by reason of an unpaid call, the purchaser is liable on the unpaid subscription, the corporation having subsequently recognized him as owner of the stock. *Basting v. Northern Trust Co.*, 61 Minn. 307 (1895). See also § 382, *infra*.

³ A substitution of stockholders after organization by canceling some subscriptions and filling in others is illegal. There should be a transfer. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). Where a party buys stock through a broker, and the broker, without authority, causes the stock to be transferred on the books to the purchaser, but the latter, upon receiving the certificates, returns them and repudiates the transfer and orders a sale and transfer, and the company fails before such resale is made, the purchaser is not liable to corporate creditors on the subscription price of the stock. *Glenn v. Garth*, 133 N. Y. 18 (1892). Where a person subscribes to the proposed increased capital stock, but the increase is not made, and the officers surreptitiously transfer some of their old stock to him, he is not liable on the statutory liability thereon, even though he accepted the stock, if he accepted in ignorance of the fraud practiced upon him. *Stephens v. Follett*, 43 Fed. Rep. 842 (1890). A stockholder is liable by statute on stock

where he has merely transferred the certificate, and no effort has been made to complete the transfer on the corporate books. Where a person agrees to accept a transfer of stock, and acts as director, he is liable on the unpaid subscription, though no formal transfer is made. *Weinman v. Wilksburg, etc. R'y*, 118 Pa. St. 192 (1888); *Bernard's Case*, 5 De G. & Sm. 283 (1852). See also § 260, *infra*. A person to whom stock is transferred on the corporate books is liable on the statutory liability, if he approves or acquiesces in it in any way, as by signing an application to change the charter of the bank, or by indorsing checks which are made out to him for dividends. He is estopped from denying that he knew what he was signing. It is immaterial whether a new certificate was issued to him or not. *Keyser v. Heitz*, 133 U. S. 138 (1890). *Cf. Ex parte Hall*, 1 Macn. & G. 307 (1849), holding that an unregistered transferee is not liable merely because he accepts dividends; *Shipman's Case*, L. R. 5 Eq. 219 (1868), in which a purchaser offered a name to which he wished the shares transferred on the register, but which was rejected by the directors. The vendor, in whose name they stood, was held liable for calls, and the court refused to remove his name; *Sheffield, etc. R'y v. Woodcock*, 7 M. & W. 574 (1841), holding that where, by law, transfers of stock were to be made by deed, a transfer in blank, and stating the consideration untruly, made to a purchaser who afterwards signed and sent to the company a proxy, in which he described himself as the proprietor

Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate-of-stock book that it had been transferred to him and sends him dividends, he is liable thereon,

of the shares, constituted him a stockholder for the purpose of requiring him to respond to calls for assessments; *Taylor v. Hughes*, 2 Jones & Lat. (Ir. Ch.) 24 (1844), in which the court refused to hold liable as a stockholder of a bank one who had transferred his stock seven years before, though not by a proper method, and whose name had not appeared on the books during that time, but had been re-entered by a committee after the failure of the bank. *Burnes v. Pennell*, 2 H. L. Cas. 497 (1849), held that where certain forms were to be observed by a transferee of shares in a Scotch joint-stock company, the required acts were for the benefit of the company, and therefore the leaving of one of such acts unexecuted by a purchaser was not allowed to enable him to retire from his contract. *Maguire's Case*, 3 De G. & Sm. 31 (1849). In this case a shareholder in a steam packet company transferred two shares to his son without his knowledge. The son did not receive dividends nor do any act as proprietor; but for the purpose of obtaining free passages upon the boats of the company, he obtained from the company certificates that he was a proprietor. It was held that the son was a contributory in respect of the two shares.

A receiver cannot apply to have a transferee's name put on the list of contributories on ground of undue delay of the company in registering the transfer. Only the transferrer can complain. *Sichell's Case*, L. R. 3 Ch. 119 (1867). See *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579 (1818), holding that a mere entry on the corporate books crediting the shares to

the transferee is insufficient: and see also *Dane v. Young*, 61 Me. 160 (1872), holding that the failure to have the registry properly witnessed invalidates it. A vendee of stock who is to be entitled to it only upon payment is not liable for the subscription price if he never pays for the stock and his name never appears on the books. *Cormac v. Western, etc. Co.*, 77 Iowa, 32 (1889). For other cases holding the transferee liable, although all the formalities of registry were not complied with, see *Ex parte Dixon*, 1 Dr. & Sm. 225 (1860); *Gordon's Case*, 3 De G. & Sm. 249 (1850); *Straffon's Case*, 1 De G., M. & G. 576 (1852); *Walters's Case*, 3 De G. & Sm. 149 (1850); *London, etc. R'y v. Fairclough*, 2 Man. & G. 674 (1841); *London, etc. R'y v. Freeman*, 2 Man. & G. 606 (1841); *Birmingham, etc. R'y v. Locke*, 1 Q. B. 256 (1841). For a case holding that the transferrer is liable, see *Keane's Case*, 3 De G., M. & G. 272 (1853). For cases to the effect that the transferrer is, in general, discharged only when the transfer is actually recorded, and duly recorded in the stock-book, and when all the prescribed conditions of a valid transfer have been duly complied with, see *Cartmell's Case*, L. R. 9 Ch. 691 (1874); *Heritage's Case*, L. R. 9 Eq. 5 (1869); *Henessey's Case*, 3 De G. & Sm. 191 (1850); *Ex parte Henderson*, 19 Beav. 107 (1854). Where the consent of the board of directors is necessary to a transfer, no transfer is complete without it, and the transferrer remains liable. *Bosanquet v. Shortridge*, 4 Exch. 699 (1850). But this case at law was enjoined by *Bargate v. Shortridge*, 5 H. L. Cas. 297 (1855), in equity, and it was held that the transferrer

although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the national bank act.¹

It is immaterial that no certificate of stock is issued to the transferee. The registry is complete without it.² When the transferor has done all in his power to complete the transfer and is guilty of no laches, his liability to corporate creditors is thereby determined; and accordingly he is discharged, as

was not liable. To same effect, see *Taylor v. Hughes*, 2 Jones & Lat. (Ir. Ch.) 24 (1844), where the registry was not regularly made, but the transferee was treated as a stockholder. Cf. *Murray v. Bush*, L. R. 6 H. L. 37 (1873), affirming *Bush's Case*, L. R. 6 Ch. App. 246. In this case the deed of settlement, among other things, required a transferee to covenant by deed to abide by the rules of the company. A director who failed to comply with that requirement was held to be a shareholder as to the shares, because he had been recognized as a shareholder by the directors at a meeting of shareholders and had been at that meeting elected a director. The transferor was held not liable. *Contra*, *Keene's Case*, 3 De G., M. & G. 272 (1853); *Mayhew's Case*, 5 De G., M. & G. 837 (1854), where the parties went together to the proper officer of the company and deposited a transfer, but no notice in writing was given to the officer as required by the company's rules. The transferee was held to be properly placed on the list of contributors. See also next note.

¹ *Horton v. Mercer*, 71 Fed. Rep. 153 (1895). Where a vendor of stock in a national bank transfers the certificates indorsed by him on the back to the vendee, the vendee being the cashier and the bank being solvent, and for five years dividends are paid to such cashier, the vendor is not liable, even though the stock was never transferred on the corporate books.

Snyder v. Foster, 73 Fed. Rep. 136 (1896). Where the vendor of stock in a national bank transfers the certificate to the vendee and delivers it to the president of the bank, who promises to transfer the same on the books, but does not do so, and the bank thereafter treats the vendee as the owner, the vendor is not liable on the statutory liability. *Cox v. Elmendorf*, 97 Tenn. 518 (1896).

² *First Nat. Bank v. Gifford*, 47 Iowa, 575, 583 (1877); *Brigham v. Mead*, 92 Mass. 245 (1865); *Straffon's Case*, 1 De G., M. & G. 576 (1852). *Chouteau Spring Co. v. Harris*, 20 Mo. 382 (1855), holding that an assignment upon the books of the company, without having a new certificate issued, is a sufficient transfer to exonerate the assignor from liability for assessments; and that any transfer in writing is valid against a company which, having notice, refuses to allow it to be made. The shareholder cannot set up for defense, to an action by a corporate creditor, that some third person had contracted to purchase his shares, or a portion of them, but that with the consent of the corporate authorities it had been agreed that, until that third person had paid the notes given for the purchase price of the stock, the transfer should not be made on the corporate stock-book. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294 (1876), affirming *S. C.*, 6 Hun, 293 (1875).

though the registry had been made.¹ A stockholder who received his certificate and dividends for several years cannot avoid the statutory liability on the ground that the original subscriber, from whom he purchased, never made a formal trans-

¹ *Whitney v. Butler*, 118 U. S. 655 (1886). See also § 383, *infra*. *Ex parte Henderson*, 19 Beav. 107 (1854); *Shortridge v. Bosanquet*, 16 Beav. 84 (1852), overruling *S. C. sub nom. Bosanquet v. Shortridge*, 4 Exch. 699 (1850). In *White's Case*, L. R. 3 Eq. 86 (1866), a transferrer was held not discharged because of laches; *Fyfe's Case*, L. R. 4 Ch. App. 768 (1869), where there was an improper delay on the part of the company in registering a transfer; *Lowe's Case*, L. R. 9 Eq. 589 (1870), on similar facts and to same effect; *Nation's Case*, L. R. 3 Eq. 77 (1866), in which the directors did not confirm a transfer at their next meeting after it was left for that purpose, thereby causing an unnecessary delay; *Hill's Case*, L. R. 4 Ch. App. 769 (1867), note, to same effect as *Fyfe's Case*, L. R. 4 Ch. App. 768 (1869); *Ward and Garfit's Case*, L. R. 4 Eq. 189 (1867), in which the court rectified the register by completing a transfer which was duly executed and left for registry the day before the corporation stopped business, but was not registered on that account; *Ward's Case*, L. R. 2 Eq. 226 (1866), in which the names of purchasers of shares had not been placed on the register in place of that of the vendor in consequence of disputes among themselves; *Ex parte Hall*, 5 R'y & Canal Cas. 624 (1849), holding that where a transferee whose name has not been actually entered on the registry has so acted — as being a trustee for his wife — and his acts have been so far adopted that a waiver of the necessary forms may be inferred, he will be held a contributory in winding-up proceedings. *De Pass's Case*, 4 De G. & J. 544 (1859). In this case

the certificates were transferable by delivery; and in winding-up proceedings the holders were adjudged to be contributories, though it appeared that as to some shares they were not delivered until after the winding-up order was made, and, as to others, that they were delivered to a clerk for a nominal consideration in order to escape liability. *Marino's Case*, L. R. 2 Ch. App. 596 (1867), in which the transferee, who lived in Smyrna, and had not sufficient time to execute and forward the deed required of him by the rules and usage of the company to effect a valid transfer, was held not to be a contributory; *Skowhegan Bank v. Cutler*, 49 Me. 315 (1872), holding that, in order to hold a transferee liable, it must be shown that statutory provisions relating to transfer have been observed; *Laing v. Burley*, 101 Ill. 591 (1882), holding that, where there was no transfer on the books of a national bank as required by law, but new certificates had been issued to the transferee, who was also recognized as a shareholder on the bank's ledger, the transferee was liable; *Midland, etc. R'y v. Gordon*, 16 M. & W. 804 (1847), holding that a holder of scrip certificates for shares to be allotted at a future time, having sold them in the market, was liable for calls until the name of the vendee was registered as the holder of them. See also *Harpold v. Stobart*, 46 Ohio St. 397 (1889). That the failure to record the transfer is the fault of the corporation itself, or of the officer thereof whose duty it is to make the entries in the stock-book, is not sufficient to relieve the shareholder who, having transferred his shares, fails to see to

fer.¹ The corporation cannot hold liable on the unpaid subscription for stock a person who purchased and held the certificates of stock, but sold them without appearing on the corporate books as a stockholder.²

Where the transferee of the certificate has repeatedly demanded a transfer of the company, but been refused, a subsequent attachment by a creditor of the transferrer does not take precedence, even though the statutes require a registry within sixty days.³ A person who accepted a transfer of stock in order to make a quorum is liable to creditors, although he at once signed a retransfer and supposed it was recorded.⁴

§ 259. *Does the statutory liability attach to him who is the registered stockholder when the corporate debt is contracted, or is due, or is sued upon?*—When the question of statutory liability is considered there is more difficulty, as between transferrer and transferee, in determining who is to be charged. Frequently the statute itself prescribes when the liability is to attach. The important question which arises herein is whether the corporate debt raises a liability against him who was the registered stockholder when the corporation entered into the contract leading to the debt, or against him who was the registered stockholder when the debt itself became due and pay-

it that the proper entry is actually and duly made. *Re Bachman*, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310. *Cf.* 40 Alt. Rep. 905.

¹ *Bissell v. Heath*, 98 Mich. 472 (1894). The holders of stock cannot escape the statutory liability thereon, even though, when the transfer of the stock to them was made, the old certificates were not canceled, but were abstracted by a corporate officer and hypothecated by him, thereby creating an overissue. *Burt v. Bailey*, 73 Fed. Rep. 693 (1896). The stockholder of record is not relieved from liability on his subscription by the fact that at the request of the treasurer he transfers his certificate of stock in blank on the back and leaves the certificates with the treasurer, even though the motive of the treasurer was the fact that the subscriber

had not paid past-due calls. *Burt v. Real Estate, etc.*, 175 Pa. St. 619 (1896). Where, by statute, the transferrer is liable on the subscription for a year after transfer, and transfer shall be on the books, he is liable for a year after such transfer on the books. *Kruger v. Hanover Nat. Bank*, 72 Miss. 462 (1894). But where the company recognizes a transfer as having been made, the transferee then becomes liable and the transferrer's time begins to run. *Kruger v. Hanover Nat. Bank*, 16 S. Rep. 353 (1894).

² *Vale Mills v. Spalding*, 62 N. H. 605 (1883). *Cf.* § 253, *supra*.

³ *Weber v. Bullock*, 19 Colo. 214 (1893). See also ch. XXVII, *infra*.

⁴ *Ontario, etc. Assoc. v. Leys*, 23 Ont. Rep. (Can.) 496 (1893).

able to the corporate creditor, or against him who was the registered stockholder when suit is brought by the corporate creditor against the corporation to collect the debt, or against him who was the registered stockholder when suit is brought against the stockholder.

Under certain statutes to that effect, those stockholders are liable who are such at the time when the execution against the corporation is returned *nulla bona*.¹

As to whether, under the usual statute making the stockholders liable, to a greater or less extent, for the debts of the corporation, a registered stockholder is liable for debts contracted before he became such, as well as for those contracted while he was such, although he subsequently transfers his stock, the words of the statute control, and decisions on various statutes are given in the notes below.²

¹ *Nixon v. Green*, 11 Exch. 550 (1856); *Dodgson v. Scott*, 2 Exch. 457 (1848); *Longley v. Little*, 26 Me. 162 (1846); *Bond v. Appleton*, 8 Mass. 472 (1812). In this case, under a statute making the original stockholders, their successors, assigns, and the members of the corporation liable for the debts of the corporation, it was held that only such persons as were members at the time payment was refused were intended; *McClaren v. Franciscus*, 43 Mo. 452 (1869); *Dauchy v. Brown*, 24 Vt. 197 (1852). *Cf. Deming v. Bull*, 10 Conn. 409 (1835). Under the provision of a charter that stockholders should "at all times be liable for all debts due by said corporation," it was held that those who were members when the debt was contracted, but had transferred their stock absolutely and in good faith before the commencement of the suit against the corporation, are not to be held liable under the statute. *Middletown Bank v. Magill*, 5 Conn. 28 (1823), following *Bond v. Appleton*, 8 Mass. 472 (1812); *Child v. Coffin*, 17 Mass. 64 (1820), holding that where there is a statutory provision "that a creditor, in a certain case, may levy his exe-

cution upon the body or estate of any member of the corporation, this must be understood of such as were members at the time of the commencement of the action, and of those only." It does not authorize an execution upon the estate of a corporator who died before the commencement of the action.

Under the statute making all the members of a company liable in certain cases for its debts, the liability extends to all who were members when it was sought to be enforced, and is not confined to such persons as were members when the debt was contracted. *Curtis v. Harlow*, 53 Mass. 3 (1846).

² *Chesley v. Pierce*, 32 N. H. 388 (1855), holding that, under a statute making stockholders liable for the debts of a corporation, the individual stockholders are not liable for debts contracted before they became such; *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1 (1839), but here a statute made them liable for debts, etc., contracted "during the time he or they held stock;" *Mill-dam Foundry v. Hovey*, 38 Mass. 417, 453 (1834), where the question arose on an objection to a

In Kansas "a *bona fide* transfer terminates the liability of the transferrer either to the company or to creditors." Where by statute execution may be issued to enforce a statutory liability, the liability attaches to the "persons only who are stock-

witness in a suit against a corporation on the ground that it was liable for its debts; *Holyoke Bank v. Burnham*, 65 Mass. 183 (1853), a case where, under a statute making liable "all members" of a corporation, a shareholder was held for all debts contracted while he was a member, although he ceased to be a member before they were payable, and not liable for debts contracted before he became a member if his membership expired before they became payable and action brought; *Southmayd v. Russ*, 3 Conn. 52 (1819), holding that the judgment creditor cannot proceed against stockholders by *scire facias*, but must sue them upon their liability; *Williams v. Hanna*, 40 Ind. 535 (1872), holding that owners of stock at the time corporate debts are contracted are intended, in a statute making stockholders liable for all debts of the company, etc.; *Larrabee v. Baldwin*, 35 Cal. 155 (1868); *Moss v. Oakley*, 2 Hill, 265 (1842), holding that a charter declaring stockholders jointly and severally liable for the debts of the company makes liable only such as were members when the debt was contracted, and not those persons who became members afterwards; *Judson v. Rossie Galena Co.*, 9 Paige, 598 (1842), to the same effect; *McCullough v. Moss*, 5 Denio, 567, 573, 585 (1846), to same effect; *Adderly v. Storm*, 6 Hill, 624 (1844), holding that they are considered liable whose names appear on the books of the company as stockholders when the debt was contracted. But see *McMaster v. Davidson*, 29 Hun, 542 (1883), varying this rule as applicable to New York manufacturing corporations; and *cf. Tracy v. Yates*, 18 Barb. 152

(1854); *Phillips v. Therasson*, 11 Hun, 141 (1877); *King v. Duncan*, 38 Hun, 461 (1886); *Davidson v. Rankin*, 34 Cal. 503 (1868), holding that the cause of action against a stockholder of a mining corporation, under the laws of California, accrues at the same time as against the corporation. Even though a stockholder transfers his stock to a solvent purchaser, the statutory liability on debts then existing remains against him. *Gunnison v. United States Inv. Co.*, 73 N. W. Rep. 149 (Minn., 1897). The Iowa statute that a transferrer shall be liable on existing debts applies to a bonded debt, although not yet due, and includes a liability on the unpaid subscription. *White v. Greene*, 70 N. W. Rep. 182 (Iowa, 1897). Under the Ohio statutes a stockholder who transfers his stock is liable for a debt existing at the time of the transfer, and a subsequent renewal of such debt by the corporation does not release him. *Boice v. Hodge*, 51 Ohio St. 236 (1894). In Ohio those who own the stock at the time the corporate creditor commences his suit against stockholders to enforce their statutory liability are liable under the statute. It is immaterial that some of the stock was issued after the debt itself was incurred by the corporation. See *Barrick v. Gifford*, 47 Ohio St. 180 (1890). Stockholders are liable under the Ohio statute for debts incurred before they became stockholders, but the equities between them and the transferrers of the stock may be adjusted in the same suit. *Railroad Co. v. Smith*, 48 Ohio St. 219 (1891). Under the Ohio statute the transferees are liable for precedent debts. See *Brown v. Hitchcock*, 36 Ohio St. 667 (1881);

holders at the time the execution against the property or effects of the corporation is found to be ineffectual.”¹

§ 260. *Transferer's statutory liability after transfer but before registry.*—The previous section treated of the statutory liability of a transferer in cases where the transfer is recorded on

Mason v. Alexander, 44 Ohio St. 318 (1836); Wheeler v. Faurot, 37 Ohio St. 26 (1881); Brown v. Hitchcock, 36 Ohio St. 667 (1881), holding also that the liability is not discharged by a subsequent transfer of the stock; that in such cases there is an implied undertaking by the assignee to indemnify the assignor from the liability for debts contracted while he was a stockholder; Hager v. Cleveland, etc., 36 Md. 476 (1872), holding that, by virtue of the statute of Maryland, the transfer of stock does not exonerate the transferer from liability for a corporate debt contracted while he was a stockholder and before the capital stock was paid in. His liability is in the nature of a contract with the company, and is not affected by a transfer of his stock.

¹ Van Demark v. Barous, 52 Kan. 779 (1894). A person who is a stockholder in a Kansas corporation at the time when judgment is obtained against it is liable, although he was not a stockholder when the debt accrued. Rhode Island, etc. Co. v. Moulton, 82 Fed. Rep. 979 (1897).

The statutory liability in Michigan for labor performed does not render a stockholder liable for labor performed before he became a stockholder. Kamp v. Wintermute, 65 N. W. Rep. 570 (Mich., 1895). A creditor who was such before the stock was sold may enforce the statutory liability against the transferer. Voight v. Drigge, 97 Mich. 322 (1893). In Illinois suit may be brought against him who is a stockholder at the time suit is brought. “The liability being because of the ownership of stock, it follows the stock, into whosoever

hands it may go, and whoever purchases it does so at the risk of this liability.” Root v. Sinnock, 120 Ill. 350 (1887). Individual liability continues, even after the death of the stockholder, until a transfer is made. Davis v. Weed (U. S. D. C.), 44 Conn. 569 (1877); S. C., 7 Fed. Cas. 186. See also Witters v. Sowles, 32 Fed. Rep. 130 (1887); Phillips v. Therasson, 11 Hun, 141 (1877); Tracy v. Yates, 18 Barb. 152 (1854), holding that, under the New York statute of 1848, a stockholder was not liable for debts contracted before he was such. But see McMaster v. Davidson, 29 Hun, 542 (1883). Cf. Rosevelt v. Brown, 11 N. Y. 148 (1854); Cutting v. Damerel, 88 N. Y. 410 (1882). See also § 261, *infra*. A stockholder does not, by transfer, avoid a statutory liability to creditors who were such at the time of the transfer. Jackson v. Meek, 87 Tenn. 69 (1888). Under the Minnesota statute, where stockholders in banks are liable for a year after they transfer their stock, execution is first issued against the transferee. The liability cannot be enforced twice, once against the transferee and once against the transferer, on the same stock. The liability is enforced irrespective of the liability of transferers of other stock. The transferer is liable only for his proper share of the debts existing at the time of the transfer and which still remain unpaid, excepting so far as they have been paid by other stockholders. The distribution from corporate assets is for the benefit of transferees as well as the stockholders of record. The money paid by the transferees goes into the

the corporate books at the same time that the sale and transfer of the certificates are made. But frequently there is some delay in registering the transfer in the corporate books, and in such cases the further complication arises as to who is liable for cor-

common fund and is not applied to any particular debts. As to extensions of debts he is liable unless he shows that he did not consent thereto. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896). In Minnesota it is held that the stockholder's statutory liability attaches to debts due from the corporation before as well as after the stockholder bought his stock. *Olson v. Cook*, 57 Minn. 552 (1894). All who are stockholders at the time the action is commenced are liable under the Minnesota statute, irrespective of when the debt was incurred. *First Nat. Bank v. Winona Plow Co.*, 58 Minn. 167 (1894). Where the transferrer is liable for one year after a transfer, this liability applies only to debts created before the transfer. An action to enforce a liability against him may be brought within six years after the debt against the corporation matures. *Harper v. Carroll*, 62 Minn. 152 (1895). It is not always clear precisely when a given indebtedness may be held to have been "contracted." When a corporate note has been renewed, it is doubtful whether the renewal operates to create a new indebtedness or to continue and perpetuate that indebtedness for which the original note was given. In Ohio it is held that a renewal which is a payment or extinguishment of the debt discharges the shareholders who were bound under the old note. *Wheeler v. Faurot*, 37 Ohio St. 26 (1881). In Maine the date of the second or renewal note is taken as the time when the indebtedness accrued. *Milliken v. Whitehouse*, 49 Me. 527 (1860). In Massachusetts the debt is said to be contracted when the corporation ac-

cepts a bill of exchange. *Byers v. Franklin Coal Co.*, 106 Mass. 131 (1870). *Cf. Freeland v. McCullough*, 1 Denio, 414, 426 (1845), holding that, in a suit upon a note given by the corporation for a debt on a simple contract, the stockholders at the time the debt was contracted are the ones to be held liable. See also, in New York, *Parrott v. Colby*, 6 Hun, 55; affirmed, 71 N. Y. 597 (1877); *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (1879), overruling *Fisher v. Marvin*, 47 Barb. 159 (1866); *Moss v. Oakley*, 2 Hill, 265 (1842), holding that, where stockholders at the time the debt was contracted are liable, a note given for a debt will be presumed to have been made when the debt was contracted. It has been held that the debt does not accrue, as against the shareholder, at the time judgment thereon is recovered against the corporation. See § 225 (f), *supra*. And as to the effect of renewals of notes on a stockholder's liability, see § 225 (a), *supra*. *Larrabee v. Baldwin*, 35 Cal. 155, 168 (1868). In this case *Sawyer, C. J.*, said: "The claim of the respondent, that the judgment is itself a contract creating a new debt, within the meaning of the statute, for which all who were stockholders at the date of the rendition of the judgment are personally liable, is too absurd to require argument to refute it." Registered transferees are liable the same as their transferrers, even though before the transfer the statutory liability was decreased by statute. The liability to old creditors follows the stock. *National Com. Bank v. McDonnell*, 92 Ala. 387 (1891). *Cf. Tracy v. Yates*, 18 Barb. 152 (1854), holding that the transferee is not liable on

porate debts and liabilities incurred during that interim. The rule in such cases, however, is clear. The law is well settled that the transferrer of stock is liable to corporate creditors on his statutory liability, up to the time of a registry of the transfer, to the same extent that he would be if no sale and transfer of the certificate had been made until the date of the registry. Until registry is made, corporate creditors may hold the unregistered transferrer liable, as though he had not sold his stock. As to them the transfer will be deemed to have been made only at the date of the record thereof in the corporate books.¹ Such, also, is the rule of the English courts.² The

prior debts; *Cape's Case*, 2 De G., M. & G. 562 (1852), holding that the transferee is liable for debts incurred before as well as after the transfer; *McMaster v. Davidson*, 29 Hun, 542 (1883), holding that the transferee is liable on debts contracted before he became such, but falling due after he became a stockholder. Under the Massachusetts Manufacturing Act, as re-enacted in Rhode Island, "the liability extends to all persons who were stockholders when the debt was contracted, and also to all persons who are stockholders when the liability is sought to be enforced, though they may have become such since the debt was contracted, but does not extend to persons who had become stockholders after the debt was contracted, and had ceased to be such before the debt became payable and action was brought." *Sayles v. Bates*, 15 R. I. 342 (1886). By the law of copartnership a new partner is not liable for old debts. See *Lindley*, Partn. *205, 208, 435 (*Callaghan & Co.*, 1888).

¹*Richmond v. Irons*, 121 U. S. 27, 58 (1887); *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591 (1886); *Brown v. Hitchcock*, 36 Ohio St. 667 (1881), holding also that after the liability attaches to a stockholder it is not discharged by an assignment or transfer of the stock, but the subsequent holders of it impliedly undertake to indemnify the assignor from his liability. *Cf. Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871); *Jackson v. Sligo Mfg. Co.*, 1 Lea (Tenn.), 210 (1878); *Shellington v. Howland*, 53 N. Y. 371 (1873); *Johnson v. Underhill*, 52 N. Y. 203 (1873); *Veiller v. Brown*, 18 Hun, 571 (1879); *Richardson v. Abendroth*, 43 Barb. 162 (1864); *Worrall v. Judson*, 5 Barb. 210 (1849); *Borland v. Haven*, 37 Fed. Rep. 394 (1888); *Dane v. Young*, 61 Me. 160 (1872); *Skowhegan Bank v. Cutler*, 49 Me. 315 (1860); *Fowler v. Ludwig*, 34 Me. 455 (1852); *Stanley v. Stanley*, 26 Me. 191 (1846), holding that parol evidence is not admissible, as against the books of a corporation, to prove who were its stockholders

²*Musgrave's Case*, L. R. 5 Eq. 193 (1867); *Walker's Case*, L. R. 6 Eq. 30 (1868); *McEuen v. West London Wharves, etc. Co.*, L. R. 6 Ch. App. 655 (1871); *Gowers's Case*, L. R. 6 Eq. 77 (1868), holding that, where shares had been forfeited by a resolution of the directors, but the names of their

owners had not been removed from the register, they were contributories in winding-up proceedings instituted a year later. *Humby's Case*, 5 Jur. (N. S.) 215 (1859); *Head's Case*, L. R. 3 Eq. 84 (1866); *White's Case*, L. R. 3 Eq. 86 (1866); *Shepherd's Case*, L. R. 2 Ch. App. 16 (1866).

corporate creditor, in determining who are stockholders, need only show that the persons whom he sues appear as stockholders on the corporate stock-books.¹

A different question arises when an irregular registry of the transfer has been made, or the transferrer has done all in his power to effect a registry, or the corporation has accepted the unregistered transferee as a stockholder. These questions, however, are considered elsewhere.²

§ 261. *The transferee's statutory liability.*—The transferee of stock whose name has been duly entered on the stock-book as a shareholder becomes thereupon liable on the stock to corporate creditors. The registry, which operates to change the stockholder, at the same time operates to charge the transferee.³

in suits by creditors. A transferrer is liable not only for existing debts, but for future debts contracted before he transfers the stock on the books to another. Hence, where both the transferrer and transferee are liable, the loss falls upon the successive owners in the reverse order of their ownership in point of time; *Chatham Bank v. Brobston*, 27 S. E. Rep. 790 (Ga., 1897). In support of the general rule see also *Price v. Whitney*, 28 Fed. Rep. 297 (1886), holding that the executors of one whose name appears on the books as a stockholder are liable for assessment, though deceased, in his lifetime, had sold the stock; but reversed on other grounds in *Whitney v. Butler*, 118 U. S. 655 (1886). Transferrer is liable on debts existing at time of registry of transfer. *Harpold v. Stobart*, 46 Ohio St. 397 (1889). In an action to charge a transferrer for corporate debts incurred between transfer and registry, the transferee is, in Ohio, a necessary party. *Wheeler v. Faurot*, 37 Ohio St. 26 (1881). Where a certificate of stock is transferred to the corporation itself, but is not recorded on the corporate books until after the corporation is insolvent, the transferrer is liable on the stock as though no such transfer had been

made. *Harper v. Carroll*, 69 N. W. Rep. 610 (Minn., 1896). A transferrer having paid the statutory liability to the receiver of a national bank cannot recover it back from him. *Holt v. Thomas*, 105 Cal. 273 (1894). A transferrer is liable on the stock until the transfer is registered in the corporate books. *Powers v. Knapp*, 71 Hun, 371 (1893), being a case of liability under a statute; *Aulbach v. Dahler*, 43 Pac. Rep. 322 (Idaho, 1896).

¹ *Magruder v. Colston*, 44 Md. 349, 356 (1875). *Cf. Fisher v. Seligman*, 75 Mo. 13 (1881); *Adderly v. Storm*, 6 Hill, 624 (1844); *Crease v. Babcock*, 51 Mass. 525 (1846); *U. S. Trust Co. v. U. S. F. Ins. Co.*, 18 N. Y. 200, 224 (1858); *Holyoke Bank v. Burnham*, 65 Mass. 183, 187 (1853). A stockholder is presumed to be a stockholder until the contrary is shown. *Barron v. Paine*, 83 Me. 312 (1891).

² See § 258, *supra*.

³ *Webster v. Upton*, 91 U. S. 65 (1875); *De Pass's Case*, 4 De G. & J. 544 (1859); *Cape's Case*, 2 De G., M. & G. 562 (1852); *Briggs v. Waldron*, 83 N. Y. 582 (1881). *Cf. Chesley v. Pierce*, 32 N. H. 388 (1855); *Thebus v. Smiley*, 110 Ill. 316 (1884), to the effect that there can be but one amount for which there is liability on account of the same stock, and, the statutory

It is immaterial that no certificate has been issued to the transferee, or that the corporation has not issued certificates to any of the shareholders.¹ Nor will the transferee be heard to allege, as defense against an action to enforce the statutory liability, that he was induced by fraudulent representations to purchase the shares.² A stockholder in a national bank who was induced to become such by fraud may have his name taken from the list of stockholders except as against creditors of the bank who became such after he became a stockholder and without notice of the fraud.³ Whether the statutory liability attaches to a shareholder, in respect of debts contracted before he became a member of the corporation, is a question turning upon the words of the statute.⁴ Nevertheless, although the transferee may not be liable to others, he clearly is liable herein to his transferrer for liabilities herein which fall upon the latter.⁵ A purchaser of

double liability having been once met by an owner of the stock, his transferee takes it free from liability. A stockholder of record in a national bank cannot set up that the transfer was made without his knowledge or consent, where he was cashier of the bank and was bound by law to know about the stock-book. *Finn v. Brown*, 142 U. S. 56 (1891). Where the certificate of stock is transferred in June, 1891, and is transferred on the books July, 1892, and about a year afterwards the national bank becomes insolvent, the transferee is liable on the statutory liability, and the transferee cannot claim that he was ignorant of the transfer and sale, when he was during this time a director and actually indorsed the transfer on the back of the certificates so issued to him. It is immaterial that he was deceived by the transferrer. *O'Connor v. Witherby*, 111 Cal. 523 (1896). The holders of stock cannot escape the statutory liability thereon, even though when the transfer of the stock to them was made the old certificates were not canceled, but were abstracted by a

corporate officer and hypothecated by him, thereby creating an over-issue. *Burt v. Bailey*, 73 Fed. Rep. 693 (1896).

¹ See § 258, *supra*.

² *Oakes v. Turquand*, L. R. 2 H. L. 325 (1867); *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317 (1880); *Tennent v. City of Glasgow Bank*, L. R. 4 App. Cas. 615 (1879); and see ch. IX, *supra*, and §§ 163, 164, *supra*. *Cf. Slater's Case*, 35 Beav. 391 (1866). Fraud on the part of the officers in inducing the purchase is no defense to the statutory liability after the company becomes insolvent and passes into a receiver's hands. *Bissell v. Heath*, 98 Mich. 472 (1894). A transferee claiming to be defrauded is nevertheless liable on the statutory liability, where he brought a suit for damages for the fraud and recovered judgment. Such a suit is a ratification of the transfer. *Stuart v. Hayden*, 72 Fed. Rep. 403 (1895).

³ *Stufflebeam v. De Lashmutt*, 83 Fed. Rep. 449 (1897).

⁴ See § 259, *supra*.

⁵ See § 262, *infra*.

stock may be held liable to creditors upon the liability imposed by statute, although the transfer is not recorded.¹

§ 262. *Liability of transferee to transferer herein.*—A transfer of stock may be said to involve three distinct acts, all of which may take place at one and the same time, or each at a different time. There is, first, the agreement of sale, by which the right to the stock passes from the transferer to the transferee; second, the formal transfer of the certificate of stock; third, a registry of the transfer, by an entry on the corporate transfer-book. It frequently happens that the registry is not made until some time after the agreement of sale, and that during the interim calls on the subscription are made or corporate creditors' rights attach. The law then holds liable the transferer whose transfer has not been registered. But in reality his transferee ought to meet that liability. Hence the rule that for liabilities arising after a sale of stock, but before a registry of the same on the corporate books, the vendee is liable to the vendor when such liabilities are paid by the latter.² The transferer in these cases may have recourse to the real and not the nominal transferee.³ In case of several successive

¹ An unrecorded transferee was assumed to be liable on the statutory liability of stockholders, in *McDowall v. Sheehan*, 129 N. Y. 200 (1891); *Powers v. Knapp*, 71 Hun. 371 (1893).

² *Johnson v. Underhill*, 52 N. Y. 203 (1873); *Kellogg v. Stockwell*, 75 Ill. 68 (1874); *Hutzler v. Lord*, 64 Md. 534 (1886); *Brigham v. Mead*, 92 Mass. 245 (1865); *Walker v. Bartlett*, 18 C. B. 845 (1856), overruling *Humble v. Langston*, 7 M. & W. 517 (1841); *Griswell v. Bristowe*, L. R. 3 C. P. 112 (1868); *Davis v. Haycock*, L. R. 4 Exch. 373 (1869); *Bowring v. Shepherd*, L. R. 6 Q. B. 309 (1871); *Kellock v. Enthoven*, L. R. 9 Q. B. 241 (1874); S. C., L. R. 8 Q. B. 458. The statute of limitations does not begin to run against the transferer until the assessment is paid by him. *Hutzler v. Lord*, 64 Md. 534 (1885). So also when shares are sold for future delivery, but before the time for delivery the seller, in order to save the stock from

forfeiture, is compelled to pay assessments duly levied upon it, the seller may refuse to deliver until he is repaid the amount of such assessments. *Whitney v. Page* (N. Y. Supreme Ct.), *Daily Register*, March 31, 1885. A transferer who seeks recourse to his transferee for calls paid by the former after the transfer does not prove the transfer by showing a registry of the same. He must prove some act of purchase or acceptance by the transferee. *Tripp v. Appleman*, 35 Fed. Rep. 19 (1888). Where a purchaser of bank stock pays a statutory liability on said stock, he cannot recover from the vendor the amount so paid. *Danielson v. Yokaum*, 116 Cal. 382 (1897).

³ *Castellan v. Hobson*, L. R. 10 Eq. Cas. 47 (1870). But not to an intervening unregistered transferee. *Shaw v. Fisher*, 2 De G. & Sm. 11 (1848); S. C., 5 De G., M. & G. 596 (1855). See also § 253, *supra*. An unrecorded trans-

transfers, the transferrer who has paid an assessment or corporate debt may look to his immediate transferee, although there be another one in the series who will ultimately be charged.¹ Generally the transferrer who has paid seeks his remedy by a suit in equity for indemnity, and also to compel a registry of the transfer.² The transferrer who is sued and held liable in a

feree who has transferred the certificate to still another party is not liable to his transferrer for calls made after the transferee had transferred to the second transferee. *Brinkley v. Hambleton*, 67 Md. 169 (1887). In *Lesassier v. Kennedy*, 36 La. Ann. 539 (1884), an unregistered vendee escaped liability of indemnity to his vendor, because the vendee sold to a person to whom the transfer direct from the first vendor was made on the corporate books, but without the knowledge of the vendor. The dissenting opinions in this case are to be commended.

¹ *Nickalls v. Eaton*, 23 L. T. Rep. 689 (1870); *Kellock v. Enthoven*, L. R. 9 Q. B. 241 (1874). Or he may look to the final transferee, even though the call was made before the latter purchased. *Hawkins v. Maltby*, L. R. 3 Ch. App. 188 (1867). See *S. C.*, L. R. 6 Eq. 505 (1868). Where a stockholder of record sells the certificate of stock to a broker and delivers the same indorsed in blank, and the broker transfers the same to his principal, the broker is not liable to indemnify the vendor against a statutory liability which the vendor has to pay. *Boulton v. Gzowski*, 24 Ont. App. Rep. 502 (1897).

² *Wynne v. Price*, 3 De G. & Sm. 310 (1849); *Cheale v. Kenward*, 3 De G. & J. 27 (1858); *Morris v. Cannan*, 4 De G., F. & J. 581 (1862); *Butler v. Cumpston*, L. R. 7 Eq. 16 (1868); *Evans v. Wood*, L. R. 5 Eq. 9 (1867); *Paine v. Hutchinson*, L. R. 3 Eq. 257 (1866); *Cruse v. Paine*, L. R. 6 Eq. 641; *S. C.*, L. R. 4 Ch. App. 441 (1869); *Shaw v. Fisher*, 2 De G. & Sm. 11 (1848); *James*

v. May, L. R. 6 H. L. 328 (1873); *Allen v. Graves*, L. R. 5 Q. B. 478 (1870), holding that, where the purchaser did not offer as transferee the name of a person to whom no reasonable objection could be made, he had not fulfilled the contract of sale and was liable for the amount of a call subsequently made, and interest, as damages; *Shaw v. Rowley*, 16 M. & W. 810 (1847), sustaining an action for price of shares sold on which a previous call had not been paid, it being held that plaintiffs could recover because they could have paid the call and transferred the stock if defendants had furnished the name of the transferee when requested. As to interest on the amount paid, see *Hawkins v. Maltby*, L. R. 6 Eq. 505 (1868). In Ohio, under the act creating statutory liability on the part of shareholders, transferees are liable, as between themselves and their vendors, for all indebtedness of the corporation, whether incurred before or after the transfer, "as if they had owned the stock from the organization of the company." *Wheeler v. Faurot*, 37 Ohio St. 26 (1881); *Brown v. Hitchcock*, 36 Ohio St. 667 (1881), a case wherein the question of statutory liability is very fully and satisfactorily discussed. To same effect, *Cape's Case*, 2 De G., M. & G. 562 (1852). That a transferrer may compel the transferee to register the transfer, see § 384, *infra*. The court will determine the liability as between the transferrer and transferee, in connection with the corporate creditors' suit, brought to enforce the stockholder's liability. *Mason v. Alexan-*

suit in equity against all stockholders may file a cross-bill and bring in the transferee, although the transfer has never been recorded on the corporate books.¹

§§ 263-265. *A transfer to a "dummy" or to an insolvent to escape liability.*²—In the United States a transfer of shares in a failing concern, made by the transferrer with the intention and for the purpose of escaping liability as a shareholder, to a person who for any cause is incapable of responding in respect of such liability, is voidable, both as to creditors of the company and as to other shareholders; and that, too, although as between the transferrer and transferee the transaction may have been absolute and no secret trust involved.³ A stock-

der, 44 Ohio St. 318 (1886). Sayles v. Blane, 19 L. J. (Q. B.) 19 (1849), holds that a transferrer who continues to be the owner on the registry, and who has been compelled to pay calls made after the transfer, cannot recover the money so paid from the transferee upon the common count for money paid for his use.

¹Harper v. Carroll, 69 N. W. Rep. 610 (Minn., 1896).

²The cases in this section refer to instances where a person transfers stock from his own name to that of a "dummy." An entirely different class of cases exists where the person really interested buys stock or subscribes for stock in the name of a "dummy," and the name of the real owner never appears on the corporate books. The latter class of cases is considered in § 253, *supra*.

³Quoted and approved in National, etc. Co. v. Story, etc. Co., 111 Cal. 531 (1896); Nathan v. Whitlock, 3 Edw. Ch. (N. Y.) 215 (1838); S. C., 9 Paige, 152 (1841); Wishard v. Hansen, etc. Co., 68 N. W. Rep. 691 (Iowa, 1896); Rider v. Fritchey, 49 Ohio St. 285 (1892). A transferrer will be held liable herein though the transfer of the certificate was made long previous, but registered only shortly before insolvency, and though all parties acted in good faith. Richmond v. Irons, 121 U. S.

27, 58 (1887); Veiller v. Brown, 18 Hun, 571 (1879); McClaren v. Franciscus, 43 Mo. 452 (1869); Miller v. Great Republic Ins. Co., 50 Mo. 55 (1872), holding, however, that if a sale and transfer be made honestly and without intent to defraud the creditors of the corporation, the fact that the purchaser is insolvent will not render the vendor liable; Provident Sav. Inst. v. Jackson Place, etc. Rink, 52 Mo. 557 (1873); Chouteau Spring Co. v. Harris, 20 Mo. 382 (1855); Mandion v. Firemen's Ins. Co., 11 Rob. (La.) 177 (1845), where the transfer was a gift; Re Bachman, 12 Nat. Bankr. Reg. 223 (1875); S. C., 2 Fed. Cas. 310; Marcy v. Clark, 17 Mass. 330 (1821); Central Agric. etc. Assoc. v. Alabama, etc. Ins. Co., 70 Ala. 120 (1881); Gaff v. Flesher, 33 Ohio St. 107 (1877); Dauchy v. Brown, 24 Vt. 197 (1852); Aultman's Appeal, 98 Pa. St. 505 (1881). In the last case one who held stock as collateral security and surrendered it, after the company's insolvency, to the company, which issued a new certificate to the former owners, was held responsible to the creditors of the company. Everhart v. West Chester, etc. R. R., 28 Pa. St. 339 (1857); Rider v. Morrison, 54 Md. 429 (1880); Paine v. Stewart, 33 Conn. 516 (1866); Bowden v. Santos, 1 Hughes, 158 (1877);

holder in an insolvent national bank cannot avoid the liability thereon by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of a transfer on the books of the bank, that it is insolvent or about to fail. The receiver may treat the person so transferring his stock as the real stockholder, without reference to whether the transferee is solvent or not.¹ If a national bank is able to

S. C., 3 Fed. Cas. 1034; *Wehrman v. Reakirt*, 1 Cin. Super. Ct. (Ohio), 230 (1871); *Bowden v. Johnson*, 107 U. S. 251 (1882); *Davis v. Stevens*, 17 Blatchf. 259 (1879); S. C., 7 Fed. Cas. 177. *Cf. Allen v. Montgomery R. R.*, 11 Ala. 437 (1847); *Billings v. Robinson*, 28 Hun, 122 (1882); *aff'd*, 94 N. Y. 415 (1884). It is also held that the owner of stock cannot escape liability by transferring it to his infant children, or by taking it originally in their names. See § 250, *supra*. It has been held, also, that no transfer made in anticipation of a judgment against the corporation, and for the purpose of escaping liability, is valid, and shareholders who make such a transfer will be held liable. *McClaren v. Franciscus*, 43 Mo. 452 (1869); *Marcy v. Clark*, 17 Mass. 330 (1821). Where a transfer is merely colorable, with a secret trust in favor of the transferor, the transferor is still liable. *Sinclair v. Dwight*, 9 N. Y. App. Div. 297 (1896), a dictum. Although creditors may object to an assignment of stock to an irresponsible party after the corporation has become insolvent, yet the corporation itself cannot object and sue the transferor, where the corporation has accepted the transfer and issued new stock to the transferee, even though the latter is irresponsible. *Rochester, etc. Co. v. Raymond*, 4 N. Y. App. Div. 600 (1896). A transfer to a dummy does not relieve the transferor from liability to corporate creditors, even though the transfer was made before the corporate debts were incurred. *Pio-*

neer Fuel Co. v. St. Peter, etc. Co., 64 Minn. 386 (1896).

¹*Stuart v. Hayden*, 169 U. S. 1 (1898). Where the real owner of stock in a national bank transfers it to another person, or causes it to be placed in the name of another person, to avoid the liability to creditors under the national bank act, such real owner may be held liable on such stock. *Pauly v. State, etc. Co.*, 165 U. S. 606 (1897). Where a stockholder in a failing national bank transfers his stock without consideration to his children, and the bank fails within five months, the transferor is liable on the statutory liability, and the transferees are also liable. *Foster v. Lincoln*, 74 Fed. Rep. 382 (1896). Where a national bank, although not supposed to be insolvent, may not be able to stand a run, which has commenced, a stockholder cannot give away and transfer his stock to his children and avoid the liability. *Foster v. Lincoln*, 79 Fed. Rep. 170 (1897). In proving that the transferor knew the bank was insolvent, it is enough to show that he had good ground to apprehend the failure and made the transfer to relieve himself of liability. *Cox v. Montague*, 78 Fed. Rep. 845 (1897). A stockholder in a national bank who transfers his stock in order to avoid the statutory liability may be held liable, and this liability may be enforced by the receiver of the bank. *Stuart v. Hayden*, 73 Fed. Rep. 402 (1895), holding also that, in such a suit, a cross-bill of the transferee for a rescission on the ground that he was

meet its obligations at the time of the transfer of stock, the transferor is no longer liable on the statutory liability, even though his motive may have been to escape liability on the stock.¹ But, on the other hand, where the transfer was made to an irresponsible person, it is immaterial as to whether the transferor knew of such insolvency of the bank or not.² A gift of stock in an insolvent national bank to an irresponsible person is nevertheless legal, and relieves the transferor from liability, if the transferor did not in fact know that the bank was in a failing condition.³ Where a national bank is insolvent, and a stockholder transfers his stock to an irresponsible person, both the transferor and the transferee are liable.⁴ In Nebraska, however, a receiver may join both the transferor and transferee in a suit to set aside the transfer as fraudulent, and to hold the transferor liable; but if the transferee is held liable the transferor cannot be.⁵ If the transfer is *bona fide*, and the transferor is ignorant of the insolvency of the transferee, and the company is not insolvent, the transfer is effectual, and the transferor is released from liability.⁶ Moreover, a stockholder in an insolvent corporation may sell and transfer his stock to another person for the purpose of avoiding liability as to future debts of the corporation. The rule prohibiting such transfers applies only to debts existing at the time of the transfer.⁷ Where a person transfers his stock regularly on the

defrauded cannot be tried in that suit.

¹ *Stuart v. Hayden*, 169 U. S. 1 (1898).

² *Stuart v. Hayden*, 169 U. S. 1 (1898).

³ *Sykes v. Holloway*, 81 Fed. Rep. 432 (1897). Compare *Stuart v. Hayden*, 196 U. S. 1 (1898), where the court declined to pass on this question.

⁴ *Baker v. Reeves*, 85 Fed. Rep. 837 (1898).

⁵ *Morrill v. Crawford*, 70 N. W. Rep. 954 (Neb., 1897).

⁶ *Miller v. Great Republic Ins. Co.*, 50 Mo. 55 (1872). See also *Cole v. Ryan*, 52 Barb. 168 (1868). Cf. *Billings v. Robinson*, 94 N. Y. 415 (1884); *S. C.*, 28 Hun, 122 (1882). A stockholder who promises a corporate creditor, at a time when the company's affairs

are involved, that he will not transfer, thereby inducing him not to sue to collect his debt, is liable to such creditor in case he does transfer. *Paine v. Stewart*, 33 Conn. 516 (1866). But a transfer will be held valid, it seems, when it is made pursuant to an antecedent option agreement, although the final transfer is really made in order to avoid liability. *Holyoke Bank v. Burnham*, 65 Mass. 183 (1853); *Magruder v. Colston*, 44 Md. 349 (1876). Cf. *Chapman v. Shepherd*, L. R. 2 C. P. 228 (1867), under the English statute.

⁷ *Sinclair v. Dwight*, 9 N. Y. App. Div. 297 (1896). In Ohio it is legal for a stockholder in an insolvent corporation to transfer his stock to an

books to another person who is solvent, corporate creditors who become such after the transfer cannot have recourse to the transferrer on the statutory liability, even though the transferee becomes insolvent.¹ The creditor's remedy to enforce the liability of a shareholder who has in this way fraudulently assigned or transferred his stock is in a court of chancery.² Where national bank stock has been transferred in order to avoid the liability thereon, a bill in equity lies to hold the transferrer liable, even though it is admitted that the transfer was illegal.³ The state statute of limitations begins to run against an assessment of the comptroller on national bank stock from the time the assessment is due; and the same length of time will be a bar to a suit in equity, even as against the party who transferred the stock to an irresponsible person in order to avoid liability.⁴

§ 266. *The rule in England.*—The rule in England is that a shareholder may transfer his shares, when the company is in a failing condition, to a man of straw for a nominal consideration, even though the sole purpose of such a transfer be to escape liability. If the transfer be out and out, and not merely colorable and collusive, with a secret trust attached, it is valid, and the transferrer is thereby released from liability, both as to corporate creditors and the other shareholders.⁵ But if the

insolvent for the purpose of avoiding liability on the stock to future corporate creditors. *Peter v. Union, etc. Co.*, 46 N. E. Rep. 894 (Ohio, 1897).

¹ *Merrill v. Meade*, 49 Pac. Rep. 787 (Kan., 1897).

² *Johnston v. Southwestern R. R. Bank*, 3 Strobb. Eq. (S. C.) 263, 295 (1848). A receiver of a national bank may sue in the federal courts to ascertain and fix the liability on stock which has been transferred to avoid liability, where the amount involved is over \$2,000. *Thompson v. German, etc. Co.*, 76 Fed. Rep. 892 (1896).

³ *Zimmerman v. Carpenter*, 84 Fed. Rep. 747 (1898).

⁴ *Thompson v. German, etc. Co.*, 77 Fed. Rep. 258 (1896).

⁵ *De Pass's Case*, 4 De G. & J. 544 (1859); *Weston's Case*, L. R. 4 Ch. App.

20 (1868); *Harrison's Case*, L. R. 6 Ch. App. 286 (1871); *Masters's Case*, L. R. 7 Ch. App. 292 (1872); *Hakim's Case*, L. R. 7 Ch. App. 296, n. (1869); *Bishop's Case*, L. R. 7 Ch. App. 296, n. (1869); *Williams's Case*, L. R. 1 Ch. D. 576 (1875); *King's Case*, L. R. 6 Ch. App. 196 (1871); *Chynoweth's Case*, L. R. 15 Ch. D. 13 (1880); *Jessopp's Case*, 2 De G. & J. 638 (1858); *Re Taurine Co.*, L. R. 25 Ch. D. 118 (1883); *Moore v. McLaren*, 11 U. C. (C. P.) 534 (1862); *Battie's Case*, 39 L. J. (Ch.) 391 (1870). *Cf. Bunn's Case*, 2 De G., F. & J. 275 (1860). Thus, in *De Pass's Case*, 4 De G. & J. 544 (1859), the facts were that De Pass, owning two hundred and fifty shares of stock in the Mexican & South American Company, for which he had paid £1,750, upon learning that the concern was involved, handed the cer-

transfer is merely colorable, and there exists a secret trust in favor of the transferrer, so that as between the parties there has been no *bona fide* transfer, but the object is to secure the shares to the transferrer in the event that the concern becomes prosperous, and to leave them to the transferee if there is a winding up, the transferrer's name will be put in the list of contributories, and the pretended transfer be wholly ignored.¹

The right to transfer shares in England seems to exist up to the time the company is ordered to be wound up and business is suspended.² But after that time the right is gone, and it is the duty of the management to refuse to allow a transfer.³

tificate to his clerk, without having previously spoken to him of the matter, saying that he might have the stock for a sovereign, which the clerk instantly paid, and at the same time accepted the shares. In about three weeks this clerk sold the shares to another person in the employ of De Pass. Upon the winding up of the company, which was ordered within a few days after the sale by De Pass to his clerk, although it was shown that the shares at the time of that sale were worth considerably more than a sovereign, still, inasmuch as the transaction appeared to have been absolute, although confessedly made to escape possible liability, it was held that the transfer might stand, and that De Pass was not liable in respect to the shares after the date of the sale to the clerk. But in *Masters's Case*, L. R. 7 Ch. App. 292 (1872), a transfer of two hundred and eighty shares of stock, on which £15 per share had been paid, for a nominal consideration, to an irresponsible son-in-law of the transferrer, the transfer being made only for the purpose of escaping liability upon the shares, was held to discharge the transferrer. A transfer by a director in a failing corporation to avoid liability is void. *Re South London, etc. Co.*, L. R. 39 Ch. D. 324 (1888).

¹ *Budd's Case*, 3 De G., F. & J. 297

(1861); *Payne's Case*, L. R. 9 Eq. 223 (1869); *Kintrea's Case*, 39 L. J. (Ch.) 193 (1869); S. C., L. R. 5 Ch. App. 95; *Chinnoek's Case*, Johns. (Eng. Ch.) 714 (1860); *Costello's Case*, 2 De G., F. & J. 302 (1860); *Hyam's Case*, 1 De G., F. & J. 75 (1859); *Lund's Case*, 27 Beav. 465 (1859); *Ex parte Bennett*, 18 Beav. 339 (1854); *Daniell's Case*, 22 Beav. 43 (1856); *Eyre's Case*, 31 Beav. 177 (1862); *Munt's Case*, 22 Beav. 55 (1856); *Bank of Michigan v. Gray*, 1 U. C. (Q. B.) 422 (1834); *Cox's Case*, 33 L. J. (Ch.) 145 (1864); *Williams's Case*, L. R. 9 Eq. 225, n. (1869); *Capper's Case*, L. R. 3 Ch. App. 458 (1868); *Mann's Case*, L. R. 3 Ch. App. 459, n. (1867); *Ex parte Hatton*, 31 L. J. (Ch.) 340 (1862); *Pugh's Case*, L. R. 13 Eq. 566 (1872); *Lankester's Case*, L. R. 6 Ch. App. 905, n. (1870); *Gilbert's Case*, L. R. 5 Ch. App. 559 (1870). *Cf. Mitchell's Case*, L. R. 9 Eq. 363 (1870); *Slater's Case*, 35 Beav. 391 (1866); *Castellan v. Hobson*, L. R. 10 Eq. 47 (1870); *Maynard v. Eaton*, L. R. 9 Ch. App. 414 (1874); *Colquhoun v. Courtenay*, 43 L. J. (Ch.) 338 (1874); *Richardson's Case*, L. R. 19 Eq. 588 (1875).

² *De Pass's Case*, 4 De G. & J. 544 (1859), and the cases generally in the preceding notes.

³ *Mitchell's Case*, L. R. 4 App. Cas. 548 (1879); *Weston's Case*, L. R. 4 Ch. App. 20, 30 (1868); *Ex parte Parker*, L. R. 2 Ch. App. 685 (1867); *Chappell's*

Any collusion between the stockholders and the directors to evade the rules governing transfers, for the purpose of evading liability, will invalidate the transfer.¹ Persons to whom shares have been transferred without their knowledge or assent are not estopped, when the knowledge is brought to them, from repudiating and denying the stockholdership.²

Case, L. R. 6 Ch. 902 (1871). In this country directors have in general no power to refuse or prevent transfers, such as inheres in the boards of management in English companies.

¹ Eyre's Case, 31 Beav. 177 (1862); Bennett's Case, 5 De G., M. & G. 284 (1854). Nor may a director make use of his position as director to transfer his stock, and thus escape chargeability upon it. Munt's Case, 22 Beav. 55 (1856). Nor will a stockholder be allowed to relieve himself, when he learns of the probable insolvency of the concern, by inducing the directors to postpone their application for an order to wind up until he have time to transfer his shares to a pauper or other irresponsible person. *Ex parte* Parker, L. R. 2 Ch. App. 685 (1867); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Allin's Case, 16 Eq. 449 (1873). And a director who transfers shares standing in his name to a person already holding all the shares any one person is allowed to hold will not thereby escape liability. *Ex parte* Brown, 19 Beav. 97 (1854). In general, moreover, a transferrer is not exempt from liability by reason of a transfer, unless the transferee has the present capacity to assume the liability. Nickalls v. Merry, L. R. 7 H. L. 530 (1875); Brown v. Black, L. R. 8 Ch. App. 939 (1873); Mann's Case, L. R. 3 Ch. App. 459, n. (1867). *Cf.* Johnson v. Laffin, 5 Dill. 65, 81 (1878); S. C., 13 Fed. Cas. 758, 764; *aff'd*, 103

U. S. 800 (1880); *Re Reciprocity Bank*, 22 N. Y. 9 (1860). Accordingly, a transfer to an infant for the purpose of escaping liability is futile. Symons's Case, L. R. 5 Ch. App. 298 (1870); Weston's Case, L. R. 5 Ch. 614 (1870); Curtis's Case, L. R. 6 Eq. 455 (1868); Castello's Case, L. R. 8 Eq. 504 (1869); Walsh v. Union Bank, 5 Quebec L. R. 298 (1879).

² Birch's Case, 2 De G. & J. 10 (1857); Fox's Case, 3 De G., J. & S. 465 (1863); Higgs's Case, 2 Hem. & M. 657 (1865); Somerville's Case, L. R. 6 Ch. App. 266 (1871). *Cf.* Bullock v. Chapman, 2 De G. & Sm. 211 (1848). And see also *Re Reciprocity Bank*, 22 N. Y. 9 (1860). A colorable transfer, as has appeared, will not operate to discharge the transferrer where shares were collusively assigned to a servant for the purpose of evading liability. Hence when the servant, upon the concern becoming solvent, attempted to claim the shares as though the transfer had been out and out, the court having previously decided against the *bona fides* of the transaction, it was held that the owner was entitled to a declaration that the servant held the shares in trust for him. Colquhoun v. Courtenay, 43 L. J. (Ch.) 338 (1874). As to a transfer made in ignorance of the fact that a winding up has been commenced, see Emmerson's Case, L. R. 1 Ch. App. 433 (1866). In general, see Sigua, etc. Co. v. Greene, 88 Fed. Rep. 207 (1898).

CHAPTER XVI.

ISSUE OF PREFERRED STOCK AND STOCK UPON WHICH INTEREST IS GUARANTEED.

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| <p>§ 267. What is preferred stock.</p> <p>268. When may a corporation issue preferred stock?</p> <p>269, 270. Rights of preferred stockholders—Amount of preference—Voting—Subsequent leases, consolidations, etc.</p> <p>271. Preferred stockholders are not creditors—Dividends can be only from profits—Mortgages securing preferred stock.</p> <p>272. What are net profits applicable to preferred dividends—The preferred stockholder's</p> | <p>remedy to enforce a dividend.</p> <p>§ 273, 274. Arrears of preferred stock, to what extent payable subsequently—Remedies to enforce payment of arrears.</p> <p>275. Rights of the assignee or transferee of preferred stock in arrears of dividends.</p> <p>276. "Special stock" in Massachusetts.</p> <p>277. Interest-bearing stocks.</p> <p>278. Rights of preferred shareholders on dissolution and on a reduction of the capital stock.</p> |
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§ 267. *What is preferred stock.*—By preferred stock is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings.¹ In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend can be paid.² The relation of debtor and creditor does not exist between the preferred stockholders and the corporation, and the right to a preferred or guaranteed dividend is not a debt until the dividend is declared. A dividend is money paid out of profits by a corporation to its shareholders. A preferred dividend is nothing more than that which is paid to one class of shareholders in priority to that to be paid to another class.³ Guaranteed

¹ *Totten v. Tison*, 54 Ga. 139 (1875).

² *Chaffee v. Rutland R. R.*, 55 Vt. 110 (1882).

³ *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885); *Taft v. Hartford, etc. R. R.*, 8 R. I. 310, 333 (1866); *Chaffee v. Rutland, etc. R. R.*, 55 Vt. 110 (1882). A preferred dividend has also been defined as "substantially interest chargeable exclusively on prof-

its." *Henry v. Great Northern R'y*, 1 De G. & J. 606, 637 (1857); *Crawford v. North Eastern, etc. R. R.*, 3 Jur. (N. S.) 1093 (1856). The preferred stockholder is one who may say, "Nobody shall have any portion of the profits of the company until I have been paid my dividend." *Henry v. Great Northern R'y*, 4 Kay & J. 1, 33 (1857); *aff'd*, 1 De G. & J. 606. A

stock is the same thing as preferred stock,¹ except of course where one corporation guarantees dividends on the stock of another corporation.² Founders' shares are a species of preferred or deferred stock, peculiar to England.³

§ 268. *When may a corporation issue preferred stock?*—Upon the incorporation of a company the incorporators and stockholders may agree that a part of the stock shall be preferred stock. This is generally done by a by-law. It is undoubtedly legal, since there is no rule of public policy that forbids it, and moreover it amounts only to a contract of the stockholders as to how they shall divide the profits among themselves.⁴

preferred dividend is said to be "a pledge of the funds legally applicable to the purposes of a dividend." *Taft v. Hartford, etc. R. R.*, 8 R. I. 310, 335 (1866). "Payment of dividends to preferred stockholders differs from such payment to the holders of common stock only in that they are entitled to dividends in priority to any dividends upon the common stock." *Miller v. Ratterman*, 47 Ohio St. 141, 158 (1890).

¹ *Taft v. Hartford, etc. R. R.*, 8 R. I. 310, 333, 335 (1866); *Field v. Lamson, etc. Co.*, 162 Mass. 388 (1894); *Henry v. Great Northern R'y*, 4 Kay & J. 1, 12, 21 (1857); *aff'd*, 1 De G. & J. 606; *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875). A guaranteed dividend differs in nothing from a preferred dividend. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). *Cf.* *Boardman v. Lake Shore, etc. R'y*, 84 N. Y. 157, 174 (1881), holding that the word "guaranteed" made the dividends cumulative. See §§ 273, 274, *infra*.

² See ch. XLVI, *infra*.

³ See § 14, *supra*.

⁴ *Hamlin v. Toledo, etc. R. R.*, 78 Fed. Rep. 664 (1897). The case *Re South Durham Brewery Co.*, L. R. 31 Ch. D. 261 (1885), clearly holds that, although the charter and statutes are silent on the subject, yet that the by-laws may provide for the issue of preferred stock, and, this provision

being in the original by-laws, a stockholder cannot enjoin a subsequent issue of the stock; approving *Harri-son v. Mexican R'y*, L. R. 19 Eq. 358 (1875). Judge Cooley, in the case of *Lockhart v. Van Alstyne*, 31 Mich. 76, 81, 85 (1875), said, in reference to the issues of preferred stock, even though the issues are not provided for by charter or statute, "there can be no reasonable objection to them if they are entered into with full knowledge on the part of all concerned. . . . The guaranty, properly construed, is not void, but unobjectionable." In *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159 (1879), affirming 17 Hun, 169, the court said: "We know nothing in the constitution or the law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another, and thus offering its stock to the public for subscriptions thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name, and what right he got when he thus became a stockholder. There need be no deception or mistake; there would be no trenching upon rights previously acquired; no contract, express or implied, would be broken or impaired." The same question has recently arisen in the

But after the corporation has been organized, with common stock only, and the stock issued in whole or in part, and business commenced and money invested in stock, it is then too late to make the unissued stock preferred stock, or to increase the capital stock and issue preferred stock, unless all the stockholders assent thereto. It would be a breach of contract to issue preferred stock then, inasmuch as the existing stockholders

United States courts, and the court there held that a stockholder who participates in the issue cannot, after two years, when the corporation is insolvent, say that the statutes of the state authorize the issue of common stock only. *Banigan v. Bard*, 134 U. S. 291 (1890), *aff'g Bard v. Banigan*, 39 Fed. Rep. 13. Although the banking law of New York provides only for instalment stock for building associations, yet the parties interested may provide for prepaid and income stock as well as instalment stock. *People v. Preston*, 140 N. Y. 549 (1894). Preferred stock may be issued without statutory authority. *Havemeyer v. Bordeaux Co.*, 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). After the lapse of twenty years, the creation of preferred stock cannot be attacked by a stockholder. *Higgins v. Lansingh*, 154 Ill. 301 (1895). The highest authority in England, *Lindley on Companies* (Eng., 1889), p. 396, says: "Shares conferring on their holders preferential or additional rights not enjoyed by the holders of other shares are called preference shares. They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested. If, however, authority to issue them is given by a company's memorandum of association, or by its articles of association as originally framed, preference shares may be issued." If all assent, the issue is legal. *Re Bridgewater Nav. Co.*, L. R. 39 Ch. D. 1 (1888); *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181 (1880). In *Bates v.*

Androscoggin, etc. R. R., 49 Me. 491 (1860), preferred stock was issued by unanimous consent, but without express statutory authority. Preferred stock was issued without statutory authority in *Gordon v. Richmond, etc. R. R.*, 78 Va. 501 (1884). In *Sturge v. Eastern Union R'y*, 7 De G., M. & G. 158 (1855), the court declined to pass upon the question whether, at common law, it was legal for a corporation to issue preferred stock. In England a stock dividend of preferred stock may be enjoined by any stockholder, inasmuch as any stock dividend may be objected to. In America the rule is different. See ch. XXXII, *infra*. A person who participates in an issue of preferred stock, and also subscribes for part of it, cannot repudiate it upon the insolvency of the company. *Bard v. Banigan*, 39 Fed. Rep. 13 (1889); *aff'd, Banigan v. Bard*, 134 U. S. 291. Where a person bought new preference stock of a railway company which both he and the directors *bona fide* believed they had power to issue, but which, in truth, they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. *Eaglesfield v. Londonderry, L. R.* 4 Ch. D. 693 (1876). It is no defense to a subscription for stock that the company had secretly agreed with certain subscribers to give them a preferred dividend. Such an agreement is void as regards another subscriber who did not assent thereto. *Ryder v. Alton, etc. R. R.*, 13 Ill. 516 (1851).

invested their money on the basis of common stock only. Hence a dissenting stockholder may enjoin the corporation, the directors, and the majority of stockholders from issuing preferred stock in such a case.¹

So also a common stockholder may object where preferred and common stock are already issued and an attempt is made to issue second preferred.²

But the dissenting stockholder must move quickly in the matter. If he delays in bringing his suit, so that the interested parties are justified in believing that he acquiesces in the issue, and the issue itself is made, his remedy is barred. His injunction suit will fail.³ If, however, the statutes of the state au-

¹ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159 (1879). After common stock has been issued, no provision having been made at the time for the issue of preferred stock, and there being no charter provision authorizing the issue of preferred stock, any stockholder can object to an issue of preferred stock. *Knoxville, etc. R. R. v. Knoxville*, 98 Tenn. 1 (1896). Compare *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, overruling *Hutton v. Scarborough, etc. Co.*, 2 Dr. & Sm. 521 (1865). In the case of *Moss v. Syers*, 32 L. J. (Ch.) 711 (1863), the court, at the instance of dissenting stockholders, enjoined the issue of preferred stock which was not provided for by the charter or by the original agreement of the stockholders. A pledgee of a certificate of stock is not bound by a subsequent agreement of all the stockholders to surrender to the corporation a part of their stock, which part is then to be considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will

order a transfer free from the agreement. *Campbell v. American Zylo-nite Co.*, 122 N. Y. 455 (1890). A preliminary injunction against the issue of preferred stock in order to raise capital for an old corporation was refused in *Fielden v. Lancashire, etc. R'y*, 2 De G. & Sm. 531 (1848), because only five stockholders dissented, but the court expressly refused to declare the issue a legal one.

² *Melhado v. Hamilton*, 28 L. T. Rep. 578 (1873); affirmed, 29 L. T. Rep. 364.

³ A stockholder who is an officer of the company, who is active in having preferred stock issued, subscribes for it, pays for it, takes his certificate therefor, votes upon it, and induces others to take it, cannot after two years, when the corporation is insolvent, say that the statutes of the state authorize the issue of common stock only. *Banigan v. Bard*, 134 U. S. 291 (1890), aff'g *Bard v. Banigan*, 39 Fed. Rep. 13. In *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, where preferred stock had been issued in 1865 upon an increase of the capital stock, although neither the charter nor the by-laws authorized any preferences, the court held that the issue was legal, and overruled *Hutton v. Scarborough, etc. Co.*, 2 Dr. & Sm. 521 (1865); rev'g *Andrews v. Gas Meter Co.*, 75 L. T. Rep. 267. The court has refused relief

thorize the issue, or if the by-laws contemplate a future issue of preferred stock, its issue will be legal, even though some of the stockholders object.¹

Where the articles of incorporation specify the amount of preferred and common stock, and also state that further stock may be issued, this increased stock must be common stock, and cannot be second preferred stock, even though the by-laws provide that it may be issued on such conditions as the corporation may determine.² Nevertheless the articles of incorporation may be so drawn as to allow subsequent issues of preferred stock.³

Preferred stock may be issued subsequently to the issue of the common, and against the dissent of the minority stockholders, where the legislature amends the charter and provides for the issue of preferred stock. Such an amendment is considered

where there was a delay of four years, *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159 (1879); or ten years, *Taylor v. South, etc. R. R.*, 4 Woods, 575 (1882); S. C., 13 Fed. Rep. 152. Delays in raising the question of the validity of an issue of preferred stock, advantages having accrued in the meantime to the corporation and the shareholders, have been held such acquiescence as will bar the right of a stockholder to object. Acceptance of the preferred stock and dividends thereon also bars the right to challenge the legality of the issue. *Branch v. Jesup*, 106 U. S. 468 (1882). Preferred stock may, by unanimous consent, be issued although the statutes are silent concerning it. When issued after the first issue of stock has been made, it may be prevented by a dissenting stockholder; yet delay on the part of the latter will bar his objection. *Hazlehurst v. Savannah, etc. R. R.*, 43 Ga. 13 (1871). But see *Moss v. Syers*, 32 L. J. (Ch.) 711 (1863).

¹ If the by-laws provide that any increased capital may be made in such manner and with rules, regulations, privileges, and conditions as a meeting of the stockholders might deter-

mine, preferred stock may be issued on an increase of the capital stock. *Harrison v. Mexican R'y*, L. R. 19 Eq. 358 (1875).

² *Melhado v. Hamilton*, 28 L. T. Rep. 578; affirmed, 29 L. T. Rep. 364 (1873). the court saying: "If they could issue one share they could issue a thousand, and if at seven per cent they might issue them at seventy per cent, and thus, at a general meeting, they might pass resolutions which would have the effect of utterly annihilating the interests of the ordinary shareholders."

³ The following is a charter provision in an English corporation:

Any of the original shares for the time being unissued, and any new shares from time to time to be created, may from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital, or both, or any such other special privilege or advantage over any shares previously issued, or then about to be issued (other than shares issued with a preference), or at such a premium, or with such deferred rights as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, and with any such right or without any right of voting, and generally on such terms as the company may from time to time by special resolution determine.

incidental and is constitutional.¹ Although the issue of preferred stock is not regularly authorized, yet the issue may be subsequently ratified by a stockholders' meeting.²

A subscriber to preferred stock may be liable on the subscription, although no preferred stock can be issued, where he continues to act as a stockholder.³ A person who loans money to be repaid in such stock may recover it back if the stock cannot be issued.⁴ Where a person has subscribed for stock, but the corporation finds it has issued all of its stock, it cannot compel such subscriber to take preferred stock instead.⁵ An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by de-

¹ *Everhart v. West Chester, etc. R. R.*, 28 Pa. St. 339 (1857), holding that a charter amendment authorizing the issue was legal; *Rutland, etc. R. R. v. Thrall*, 35 Vt. 536, 545 (1863), to same effect, and holding that a common stockholder could not defeat his subscription on this ground; *Williston v. Michigan, etc. R. R.*, 95 Mass. 400 (1866); *Curry v. Scott*, 54 Pa. St. 270 (1867); *Covington v. Covington, etc. Bridge Co.*, 10 Bush (Ky.), 69 (1874), where the dissenting stockholder did not object until after the preferred stock had been issued and dividends laid upon it. In *Covington, etc. Bridge Co. v. Sargent*, 1 Cin. Super. Ct. (Ohio), 354 (1871), there is an intimation that such a statute is unconstitutional, and the court held that statutory power to issue a certain amount of preferred stock did not authorize an issue of partly preferred and partly common. This decision may well be questioned. In England an act of parliament may authorize such an issue. *Stevens v. South Devon R'y*, 9 Hare, 313 (1851). And in one case the legality of the issue of preferred stock under a statute was put upon the ground, not of the right to borrow money, but upon the ground of a right to raise funds by sale of stock. *Chaffee v. Rutland,*

etc. R. R., 55 Vt. 110 (1882). In the case of *Eichbaum v. Chicago Grain Elevators*, [1891] 3 Ch. 459, the court held that the company, upon increasing its capital stock, might, by a majority vote of its stockholders, make such increased capital preferred stock, calling for a certain dividend, with no rights in surplus profits beyond that dividend, and might give to common stockholders the right to exchange their common stock for such preferred.

² *Re London, etc. Inv. Corp.*, [1895] 2 Ch. 860.

³ Where a person subscribes for preferred stock, but no preferred stock is provided for, and he becomes a director and acts as such for several years, he is liable on such stock to corporate creditors as though it were a subscription for common stock. *Tama, etc. Co. v. Hopkins*, 79 Iowa, 653 (1890).

⁴ Where a corporation borrows money and agrees to repay it in preferred stock, but has no power to issue the preferred stock, the party paying the money may recover it back. *Anthony v. Household, etc. Co.*, 16 R. I. 571 (1889).

⁵ *Knoxville, etc. R. R. v. Knoxville*, 98 Tenn. 1 (1896).

livering common stock, where there is preferred stock issued also.¹

§ 269. *Rights of preferred stockholders — Amount of preference — Voting — Subsequent leases, consolidations, etc.*— The rights, powers, and privileges of preferred stockholders depend largely on the terms upon which the preferred stock is issued. Such stock takes a multiplicity of forms, according to the desire and ingenuity of the stockholders and the necessities of the corporation itself. The percentage of preferred dividend is always fixed at the time of the issue. It is a matter of contract.² The preferred dividends may be made cumulative or not cumulative. If nothing is specified in respect to this, then the law makes the preferred dividends cumulative.³ It seems that unless the contract expressly provides otherwise, preferred stockholders participate in the surplus profits remaining after the proper dividend has been declared on the preferred and an equal dividend on the common stock.⁴

Where the preferred stockholders are entitled to participate in all dividends paid after their preferred dividend is paid, they are entitled to participate in a dividend of scrip, similar to a stock dividend, and representing accumulative profits which have been used for betterments.⁵ The disposition of the surplus profits after the regular dividends have been paid is a matter of contract.⁶

¹ *McIlquham v. Taylor*, 71 L. T. Rep. 484 (1894); *aff'd*, 71 L. T. Rep. 679.

² The amount of preference, and whether cumulative or not, is all a matter of contract. *Smith v. Cork*, etc. R'y, Ir. Rep. 3 Eq. 356 (1869). The amount of preference may be determined by the by-laws, and the provisions of such a by-law constitute a contract. *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885).

³ See §§ 273, 274, *infra*.

⁴ See §§ 273, 274, *infra*. The following form provides against such a result:

The preferred stock of this company shall be entitled to dividends at the rate of six per centum per annum, prior to the payment of any dividends upon the common stock, and such dividends upon the preferred stock

shall be cumulative. The preferred stock shall not be entitled to any dividends in excess of said six per cent and arrears thereof.

The following provision gives a preference and also gives the preferred stockholders an interest in the remaining profits for each year:

The common stock is not to receive dividends for any year unless — per cent be first paid for that year on the existing \$ — of preferred capital stock; but when — per cent is paid for any year on the whole combined common and preferred capital stock, further dividends for that year are to be paid on all without distinction.

⁵ *Gordon's Ex'rs v. Richmond*, etc. R. R., 78 Va. 501 (1884).

⁶ Where the articles of incorporation specify that, after certain dividends have been paid on both the preferred and common stock, one-fifth of the surplus shall go to the preferred

After the preference has been fixed the company cannot alter it by altering the amount of preference and providing for the redemption of shares out of the surplus profits.¹

Preferred stockholders are entitled to vote at elections and to exercise the various rights of stockholders the same as common stockholders, unless this right is expressly withheld from them by the terms under which the stock is issued.²

As already stated, there is an infinite variety of provisions under which preferred stock may legally be issued. These provisions are to be found in the charter, the by-laws, the certificates of stock, the resolutions of the stockholders and directors, the minutes of corporate meetings, the reports of or to the company, and any contracts under which the stock was issued. The rights pertaining to the stock are matters of contract, and this contract is ascertained from the sources specified above.³ Some

stock, the company cannot devote such surplus to redeeming of shares. *Ashbury v. Watson*, L. R. 30 Ch. D. 376 (1885).

¹ *Ashbury v. Watson*, L. R. 30 Ch. D. 376 (1885). If a stockholder, by accepting the benefits, assents to a change in the privileges which pertain to his stock, he cannot afterwards object thereto. *Compton v. The Chelsea*, 13 N. Y. Supp. 722 (1891); *aff'd*, 128 N. Y. 537 (1891). A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will order a transfer free from the agreement. *Campbell v. American Zylonite Co.*, 122 N. Y. 455 (1890).

² *Miller v. Ratterman*, 47 Ohio St.

141 (1890), where the right to vote was expressly withheld. In *McIntosh v. Flint*, etc. R. R., 32 Fed. Rep. 350 (1887); S. C., 34 Fed. Rep. 582 (1888), it appeared that the common stockholders were by contract deprived of their right to vote for a specified time. In *Re Barrow, etc. Co.*, L. R. 39 Ch. D. 582 (1888), the right to vote was withheld from preferred stockholders. In *Hamlin v. Toledo*, etc. R. R., 78 Fed. Rep. 664 (1897), the court said in regard to preferred stockholders: "They surrendered the privilege of voting. That was perhaps a valid agreement between stockholders, though of doubtful public policy. They thereby gave some additional value to the common stock. The latter was the exclusive voting stock, and that was worth something, as railway management now goes."

³ *Boardman v. Lake Shore, etc. R'y*, 84 N. Y. 157 (1881); *Gordon v. Richmond*, etc. R. R., 78 Va. 501, 510 (1884); *Bailey v. Hannibal*, etc. R. R., 1 Dill. 174 (1871); S. C., 2 Fed. Cas. 371; S. C., 17 Wall. 96; *St. John v. Erie R'y*, 23 Wall. 136 (1874); *Webb v. Earle*, L. R. 20 Eq. 556 (1875); *Matthews v. Great Northern R'y*, 28 L. J. (Ch.) 375 (1859),

of the various devices for raising money by issuing various kinds of preferred stock are referred to in the notes below.¹

§ 270. Where the corporation has power to lease its road, it may make a lease, although the rental is sufficient to pay a dividend on the preferred stock alone, leaving nothing for the common stockholders.²

But in a contract of lease the rent must be applied to income bonds before it is applied to dividends and preferred stock.³

construing a statute affecting the rights of holders of "guaranteed" and "deferred" stock; *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885); *Stevens v. South Devon R'y*, 9 Hare, 313 (1851); *Sturge v. Eastern Union R'y*, 7 De G., M. & G. 158 (1855); *Harrison v. Mexican R'y*, L. R. 19 Eq. 358 (1875); *Crawford v. Northeastern R'y*, 3 Jur. (N. S.) 1093 (1856); *Henry v. Great Northern R'y*, 1 De G. & J. 606, 642, 646 (1857). See also *Coates v. Nottingham, etc. Co.*, 30 Beav. 86 (1861). The agreement is ascertained from the contract, reports, resolutions, conveyances, etc. *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892).

¹ Under the powers conferred by the statute, 30 & 31 Vict., ch. 127, various plans have been devised by English companies on the verge of insolvency to raise funds; and a favorite device is the issue of preferred shares of stock. Thus, in one case, there were five kinds of preference shares. *Corry v. Londonderry, etc. R'y*, 29 Beav. 263 (1860). See also, by way of illustration as to these various methods in England of raising funds by the issue of preferred shares, *Matthews v. Great Northern, etc. R'y*, 28 L. J. (Ch.) 375 (1859); *Re Cambrian R'ys*, L. R. 3 Ch. App. 278 (1868); *Re Potteries, etc. R'y*, L. R. 5 Ch. App. 67 (1869); *Webb v. Earle*, L. R. 20 Eq. 556 (1875); *Stevens v. Mid-Hants, etc. R'y*, L. R. 8 Ch. App. 1064 (1873); *Re Bristol, etc. R'y*, L. R. 6 Eq. 448 (1868); *Re Devon, etc. R'y*, L. R. 6 Eq. 610 (1868); *Munns v. Isle*

of Wight R'y, L. R. 8 Eq. 653 (1869); *Re East, etc. R'y*, L. R. 8 Eq. 87 (1869); *London Fin. Assoc. v. Wrexham, etc. R'y*, L. R. 18 Eq. 566 (1874); *Re Anglo-Danubian, etc. Co.*, L. R. 20 Eq. 339 (1875); *Midland, etc. R'y v. Gordon*, 16 M. & W. 804 (1847). For a scheme where the stock was divided into half shares, one-half of which were deferred to the other half, see *Re Brighton, etc. R'y*, L. R. 44 Ch. D. 28 (1890). In *Phillips v. Eastern R. R.*, 138 Mass. 122 (1884), a scheme appears by which, under a statute, the creditors elected two-thirds and the stockholders one-third of the directors.

² *Middletown v. Boston, etc. R. R.*, 53 Conn. 351 (1885). In *Re Buenos Ayres, etc. Co.*, 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders, was sustained.

³ In *Phillips v. Eastern R. R.*, 138 Mass. 122, 135 (1884), preferred stock had been offered, under a statute, in exchange for indebtedness to be paid from income only. The company leased its property, and the lessee agreed to use the net profits to pay dividends on the preferred stock, the same as the interest on such debts as had not been converted into preferred stock, and, if the net profits were not sufficient, each was to get the same proportionately. The court held this to be illegal, inasmuch as it placed the preferred stockholders on the same basis as the income creditors.

Where a corporation, having issued preferred stock, is merged into a new corporation by consolidation, the preferred shareholders of the old corporation may prosecute a suit for dividends against the new corporation, if the consolidated company has assumed all the obligations of the old company.¹

Preferred stock is entitled to subscribe for its proportionate part of new stock the same as the common stock, even though the preferred stock is limited absolutely as to dividends.²

A preferred stockholder is entitled to a certificate of stock which sets forth the fact of the preference.³

Sometimes the right is given to exchange common for preferred stock, or preferred for common, or bonds for stock. Concerning any such options, it is the settled rule that any time limited for the exercise thereof is of the essence of the offer.⁴

Dividends on the preferred stock must be on all of that class, even though some of it has been exchanged for preferred stock bearing a lower dividend.⁵

¹ Boardman v. Lake Shore, etc. R. R., 84 N. Y. 157 (1881); Chase v. Vanderbilt, 62 N. Y. 307 (1875). Cf. Prouty v. Lake Shore, etc. R. R., 52 N. Y. 363 (1873). See also § 278, *infra*.

² Jones v. Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892). Where two companies are consolidated and their stockholders are to receive new stock in exchange for old stock, such new stock to be of four different kinds, with preferences, any increase of capital stock of the consolidated company must be offered proportionately to all the stockholders making the exchange, irrespective of their preference. Jones v. Concord, etc. R. R., 38 Atl. Rep. 120 (N. H., 1892).

³ Where by statute municipal-aid bonds are to be paid for by preferred stock, the municipality may by *mandamus* compel the company to issue a certificate of stock setting forth the preference. State v. Cheraw, etc. R. R., 16 S. C. 524 (1881).

⁴ Where the corporation offers to exchange preferred for common stock, upon the payment of an additional sum of money, a stockholder who delays for thirty years to avail himself

of the privilege cannot claim the right thereto. The fact that the corporation had taken in some of the common stock on a new basis of exchange is immaterial. Holland v. Cheshire R. R., 151 Mass. 231 (1890). An extension of the time when a bond is to be paid does not extend the time within which it may be exchanged for stock of the company. Muhlenberg v. Philadelphia, etc. R. R., 47 Pa. St. 16 (1864). Where an option was given to holders of the common stock to take a certain number of new preferred shares within a given time, it was held that a shareholder who lived abroad and had no notice of the option until the expiration of the specified time could not, upon learning of it afterwards, come in and demand the right to purchase the preferred shares. Pearson v. London, etc. R'y, 14 Sim. 541 (1845). Such, also, is the rule where there is an option within a fixed time to convert loan notes into common shares. Campbell v. London, etc. R'y, 5 Hare, 519 (1846). See also § 283, *infra*.

⁵ Although the preferred stock is partly taken back by the company

Preferred stockholders are subject to a statutory liability the same as common stockholders.¹

§ 271. *Preferred stockholders are not creditors—Dividends can be only from profits—Mortgages securing preferred stock.*—Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor.²

and new preferred stock of the same amount, bearing a less dividend, is issued in exchange, yet this does not enable the company to declare a dividend on the part not exchanged, and on that alone. It must declare on all. *Coey v. Belfast, etc. R'y, Ir. Rep. 2 C. L. 112 (1866)*. If part of the preferred stockholders surrender their stock for new common stock on a reorganization without foreclosure, such stock is canceled, and holders not so surrendering their stock are entitled to arrears of dividends out of the first net profits, without allowing such surrendered stock to participate therein. *West Chester, etc. R. R. v. Jackson, 77 Pa. St. 321 (1875)*. In this case there was a special act providing for the issue of preferred stock, and afterwards another for the issue of consolidated stock. A dividend having been declared, a holder of the preferred stock, who had declined to accept the consolidated, was held "entitled to receive just what the company agreed to pay when the money was obtained." In *Griffith v. Paget, L. R. 6 Ch. D. 511 (1877)*; *S. C., L. R. 5 Ch. D. 894*, it was held that where the company is dissolved by a consolidation with another company, under a statute, the stockholders of the old being entitled to exchange their stock for stock in the new, the preferred stock is not entitled to preferred stock in the new.

¹ *Railroad Co. v. Smith, 48 Ohio St. 219 (1891)*.

² A preferred stockholder is not a creditor and cannot be made such. *Hamlin v. Toledo, etc. R. R., 78 Fed. Rep. 664 (1897)*. The House of Lords in England have clearly laid down the rule that preferred stockholders are not creditors. *Birch v. Cropper, 14 App. Cas. 525 (1889)*. The same doctrine is expressed in *Belfast, etc. R. R. v. Belfast, 77 Me. 445 (1885)*. A very full, clear, and learned discussion of the essential differences between a preferred stockholder and a creditor of a corporation is to be found in *Miller v. Ratterman, 47 Ohio St. 141 (1890)*, a case wherein the preferred stockholder was secured by a mortgage and was deprived of the right to vote at corporate elections. In *Field v. Lamson, etc. Co., 162 Mass. 388 (1894)*, it was held that, even though the statute authorized the corporation to guarantee dividends on its stock, nevertheless that the dividends could be paid only out of the net profits. *Taft v. Hartford, etc. R. R., 8 R. I. 310 (1866)*; *Chaffee v. Rutland, etc. R. R., 55 Vt. 110, 129 (1883)*, the court saying: "The claim is that he is also a creditor, with all the rights pertaining to that relation. Against this claim are the terms of the charter, the presumptions of law, and the usual course of business." In this case certificates issued for "scrip dividends" or "preferred guaranteed stock" were convertible into mortgage bonds. The company having refused to convert them, it was held that general assumpsit for the amount

The preferred shareholder is but a shareholder with a right to have his dividend paid before dividends on the common stock are paid, and he is not entitled to any dividend until the corporation has funds which are properly applicable to the payment of dividends. A contract that dividends shall be paid on the preferred stock whether any profits are made or not would be contrary to public policy and void. An agreement to pay dividends absolutely and at all events — from the profits when there are any, and from the capital when there are not — is an undertaking which is contrary to law, and is void. Public policy condemns with emphasis any such undertaking on the part of a corporation as to its preferred or guaranteed shares. Dividends on preferred stock are payable only out of the net earnings of the company.¹ The question of what constitutes net earnings

of the certificates would lie, and that the suit could be brought in the name of the holder for value. *St. John v. Erie R'y*, 10 Blatchf. 271 (1872); S. C., 21 Fed. Cas. 167; S. C., 22 Wall. 136.

¹*Taft v. Hartford, etc. R. R.*, 8 R. I. 310 (1866); *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875); *Chaffee v. Rutland, etc. R. R.*, 55 Vt. 110 (1882); *Warren v. King*, 108 U. S. 389 (1883). Under the statute in Connecticut it was held that dividends may be declared on preferred stock where the net earnings since the issue of the stock are sufficient, even though prior to such issue the capital stock had been impaired. *Cotting v. New York, etc. R. R.*, 54 Conn. 156 (1886). As supporting the rule in the text, see also *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875); *Crawford v. Northeastern, etc. R'y*, 3 Jur. (N. S.) 1093 (1856). In *Mills v. Northern R'y*, L. R. 5 Ch. App. 621 (1870), where a corporation, being in arrears in the payment of preferred stock dividends, and being at the same time largely indebted, proposed to appropriate a portion of its capital and to borrow further sums upon debentures for the purpose of paying such preferred dividends, it was held, in a suit by the creditors to prevent such

action, that inasmuch as the appropriation of the capital was justified on the ground that an equivalent portion of the revenue had been used for capital purposes, and the proposed loan was within the company's borrowing power, an injunction could not be granted. See also *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 233 (1882); *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885), and the cases *supra*.

In *Guinness v. Land Corporation*, L. R. 22 Ch. D. 349 (1882), the court declared illegal a provision for the payment of preferred dividends out of the *capital stock*. Interest on debts, even those incurred after the preferred stock was issued, and rent on leases, including those taken after such issue, must be paid before dividends are declared on the preferred stock. *St. John v. Erie R'y*, 22 Wall. 137 (1874), affirming 10 Blatchf. 271 (1872); S. C., 21 Fed. Cas. 167, defining also the meaning of net profits. In the case *Williston v. Michigan Southern, etc. R. R.*, 95 Mass. 400 (1866), the court held that preferred and guaranteed stock in a Michigan and Indiana corporation was not entitled to dividends unless there were net profits. Preferred dividends may be paid

has been treated elsewhere.¹ A subscriber for preferred stock cannot rescind the subscription on the ground that the stock contains a provision that the company shall buy it back at a certain time at par and interest. Such a provision is invalid, but does not invalidate the stock itself.² Preferred stockholders have no lien prior to the obligation of the company to pay the interest on its mortgage bonds.³

Occasionally a mortgage is given by the corporation to secure the payment of dividends on preferred stock, and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal except where it is issued under express statutory authority. It is difficult to see how stockholders can contrive legally to obtain a preference over corporate creditors, secured or unsecured, as they would do by such a mortgage. Certain it is that the courts will not readily give the stockholders a preference over creditors, even though the preferred stock is by its terms to be a first claim on the property.⁴

out of the *gross* earnings where the statute evidently so intended. *Gordon v. Richmond, etc. R. R.*, 78 Va. 501 (1884). See also *Ragland v. Broadnax*, 29 Gratt. (Va.) 401 (1877), where the court upheld the charge of guaranteed dividends on the gross receipts. That was the case of a debt converted into guaranteed stock. The debt would have borne, if it had not been converted into stock, interest at the rate of six per cent per annum, whether there were net earnings or not. The court held that the guaranty of three per cent dividend on the whole stock, which formerly belonged to the state, was simply the six per cent interest upon the debt which was converted into stock; and it also held that it was chargeable, in accordance with the plain provisions of the statute, upon the gross receipts. Guaranteed dividends can be paid only from net profits. *Miller v. Ratterman*, 47 Ohio St. 141 (1890).

¹ See ch. XXXII, *infra*.

² *Long v. Guelph, etc. Co.*, 31 C. P. Rep. (Can.) 129 (1880).

³ *Mercantile T. Co. v. Baltimore, etc. R. R.*, 82 Fed. Rep. 360 (1897).

⁴ In *Hamlin v. Toledo, etc. R. R.*, 78 Fed. Rep. 664 (1897), where the preferred stock provided that no debt except the first mortgage should come in ahead of preferred stock, the court said: "If the purpose in providing for these peculiar shares was to arrange matters so that, under any circumstances, a part of the principal of the stock might be withdrawn before the full discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby." A corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or

A mortgage to secure preferred stock and dividends thereon has been upheld in a few cases.¹ In other cases, that which was called preferred stock was nothing more than income bonds with a voting power.²

general creditors without notice of such agreement. *Continental Trust Co. v. Toledo, etc. R. R.*, 72 Fed. Rep. 92 (1896). Preferred stock which is "to be and remain a first claim upon the property of the corporation after its indebtedness" has no lien ahead of present or future debts of the company. *King v. Ohio & M. R'y*, 2 Fed. Rep. 36 (1880). See also *Warren v. King*, 108 U. S. 389 (1882), the court holding that although the certificates of preferred stock provided that it should "be and remain a first claim upon the property of the corporation after its indebtedness," etc., and although in foreclosure proceedings the preferred stockholders asked to have their stock declared a lien prior to a subsequent mortgage, yet the court refused the application, declaring that they had priority over the common stock only. It has been held, however, that where preferred stock is issued, reciting that it is a lien on all the property of the corporation after the first mortgage, the lien will be upheld by the court as against subsequent mortgages and general creditors, although such lien was not secured by any mortgage. The trustees in the subsequent deed of trust knew of and acquiesced in the priority of the preferred-stock lien, and the deed itself recognized it. This bound the bondholders. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 355 (1879); S. C., 22 Fed. Cas. 274, 288. *Cf. West Chester, etc. R. R. v. Jackson*, 77 Pa. St. 321 (1875). In this case the preferred stock to be redeemed by payment of the par value and a sum which, with dividends and interest already paid, should amount to eight per cent per annum from the

time of its purchase from the company, was declared to be a contract which entitled its holder to his dividends before dividends were paid on the common stock.

¹ Although the power of a railroad to borrow be limited, yet preferred stock may be issued secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). A deed of trust given by a corporation upon its lands to secure the performance of an undertaking of the company to pay dividends on preferred stock which was about to be issued, and also ultimately to pay for the stock itself, is a mortgage. Where the corporation's equity of redemption has been sold, the receiver of the corporation takes nothing. *Fitch v. Wetherbee*, 110 Ill. 475 (1884). In *Davis v. Second Univ. Meeting-house*, 49 Mass. 321 (1844), the stock, by a by-law, was declared to be entitled to redemption when the holder moved from the town. The court upheld and enforced the contract. In *Gordon v. Richmond, etc. R. R.*, 78 Va. 501 (1884), a mortgage had been given to secure the payment of the par value and dividends of preferred stock. The case involved a distribution of profits and not a foreclosure of the mortgage, but the court said that the mortgage was legal.

² *Burt v. Rattle*, 31 Ohio St. 116 (1876), turned upon a general "Act to authorize manufacturing corporations to issue preferred stock." Where such stock was issued certifying that the corporation guaranteed the holders certain dividends not ex-

A preferred stockholder is in no better position to enjoin the corporation from giving a mortgage than a common stockholder.¹ Where bonds are deposited as collateral security for preferred stock, it has been held that the corporation may call in, redeem, and cancel the stock in exchange for the bonds;² but this would seem to be an illegal reduction of the capital stock.

§ 272. *What are net profits applicable to preferred dividends — The preferred stockholder's remedy to enforce a dividend.*—It is largely a matter of discretion with a board of directors as to whether they will use the net profits for a dividend or will use them in the business of the company. There is a limit to this discretion, and the courts will not allow the directors to use their power oppressively by refusing to declare a dividend where the net profits and the character and condition of the business clearly warrant it. This is the rule where

ceeding legal rates, and the final payment of the certificates at a specified time, it being provided that such preferred stock might be converted into common stock, and the corporation issued its bond and mortgage to a trustee to secure such certificates, it was held that holders of the so-called preferred stock did not become stockholders and members, but creditors of the corporation, so that, on the winding up of the company's affairs, they had a lien upon the mortgage property superior to that of general creditors and assignees. "A mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend." It was a self-evident misnomer in the act. So also under a statute. See *Pittsburg, etc. R. R. v. Allegheny County*, 63 Pa. St. 126 (1869). Compare *S. C.*, 79 Pa. St. 210.

In *Miller v. Ratterman*, 47 Ohio St. 141 (1890), the court held that the fact that a mortgage had been given to secure the payment of preferred dividends does not prevent such stock

from being considered stock instead of a debt.

¹Preferred stockholders cannot prevent the corporation giving a consolidated mortgage to secure past and future debts. "Holders of preferred stock have no special control over the corporation or its management. . . . The corporation is in no sense the trustee for the holders of preferred stock. Its duty is to each alike according to the conditions attached to the stock of each." *Thompson v. Erie R'y*, 11 Abb. Pr. (N. S.) 188 (N. Y. Supr. Ct., 1871).

²*Totten v. Tison*, 54 Ga. 139 (1875). Where preferred stock is merged into bonds, the common stockholders cannot defeat the enforcing of the bonds. *Havemeyer v. Bordeaux Co.*, 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). Even though the directors have sold preferred stock held by them to the corporation and taken its notes therefor when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. *Empire Hotel Co. v. Main*, 98 Ga. 176 (1896).

all the stock is common stock.¹ Such also is the rule in regard to dividends on preferred stock. The preferred stockholder is not entitled as a matter of right to his dividend, even though there are net profits which might be used for that purpose. If the directors are reasonable in the exercise of their discretion, and use the profits to improve the corporate property, it is held by the supreme court of the United States that the discretion of the directors will not be interfered with.² This rule will work no injustice where the corporation is liable for arrears of preferred dividends. But if such arrears are not collectible under the terms upon which the stock is issued, then the rule laid down by the supreme court will result in numerous frauds by the corporation on the preferred stockholder, since no dividend might be given to the preferred stockholder unless the net profits were sufficient for a dividend on the common stock also. For instance, where there are enough profits for two annual dividends on the preferred stock and no more, it will

¹ See ch. XXXII, *infra*.

² New York, etc. R. R. v. Nickals, 119 U. S. 296 (1886), reversing Nickals v. New York, etc. R. R., 15 Fed. Rep. 575. In *Field v. Lamson, etc. Co.*, 162 Mass. 388 (1894), the court said: "We do not think that the directors and manager appear so plainly to have acted in disregard of the rights of the preferred stockholders as to justify the interference of a court of equity. The directors and manager were bound to have regard to all of the interests entrusted to them. If one class was to be favored above another, the creditors were to be looked after in preference to the stockholders. It was for the benefit of the stockholders, the preferred as well as the common, that the impaired capital should be made good, and that the business, if possible, should be put on a sound and enduring basis. We cannot say that, if dividends had been paid, the result might not have been to injure the concern, nor that the conduct of the directors and manager has not been on the whole judicious. . . . Neither

do we think that the guaranty can be regarded as an undertaking that, whenever there were net profits, they should be divided, without regard to the circumstances or situation of the company, among the preferred stockholders. The act itself does not in terms compel such a division; and we see nothing in it to take the case out of the general rule that, in the first instance, the decision of the question whether there shall or shall not be dividends lies with the company or its agents." Where a corporation sells its business in exchange for preferred stock in another corporation, the transaction cannot subsequently be set aside on the ground that the preferred dividends have not been paid. *Feld v. Roanoke Inv. Co.*, 123 Mo. 603 (1894). In *Mercantile T. Co. v. Baltimore, etc. R. R.*, 82 Fed. Rep. 360 (1897), the court ordered the receiver to pay certain debts and contract obligations, although there were profits which would have been applicable to dividends on the preferred stock if the company had not been in a receiver's hands.

be a temptation to the common stockholders to declare no dividend at all the first year, and to declare a dividend on both the common and preferred stock the second year.¹

The question of what constitutes "net profits" is discussed elsewhere.² This question has arisen a few times in connection with preferred stock, and the courts are inclined to scan closely a refusal to declare dividends where there are net profits and where the preferred stock is non-cumulative.³ In an action to

¹ For an instance, see *McIntosh v. Flint, etc. R. R.*, 32 Fed. Rep. 350 (1887); S. C., 34 Fed. Rep. 582. Preferred stockholders, even though the preferred dividend is non-cumulative, cannot prevent the company applying the earnings to a large indebtedness incurred during the year in enlarging the works and business, even though the result is that the preferred stock gets no dividend that year. The preferred stock in this case, by its terms, gave wide discretion to the directors in the matter. *McLean v. Pittsburgh Plate-Glass Co.*, 59 Pa. St. 112 (1893).

² See ch. XXXII, *infra*.

³ Non-cumulative preferred stock is entitled to a dividend where all the property is leased for \$36,000 a year; there is no floating debt; the property cost over \$1,000,000; the bonded debt of \$150,000, coming due in three years, may be extended, and all annual outlays are but \$9,000. The court will order the payment of a dividend. *Hazeltine v. Belfast, etc. R. R.*, 79 Me. 411 (1887). Directors are not allowed to use their power illegally, wantonly, or oppressively in refusing to declare dividends; but where the company owes \$88,000 floating debt; \$150,000 debt due in five years, and \$1,000,000 due in thirty-five years, at which time its profits would probably be nothing, the court will not order a dividend, even on the preferred stock, although the company has \$37,000 on hand and an annual income of \$36,000 from the

lessee of its road. *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885). Profits available for a dividend are such as are left after all debts for rolling-stock, rails, station-houses, etc., are paid, but not the money raised under the borrowing powers. *Corry v. Londonderry, etc. R'y*, 29 Beav. 263 (1860). In *Stevens v. South Devon R'y*, 9 Hare, 313 (1851), the court refused to enjoin the payment of dividends on preferred stock, even though the floating and unsecured debt had not been paid or provided for. Where, by a reorganization plan, common stockholders are allowed to vote, etc., only after certain dividends are declared on preferred stock, the court will determine whether such dividends should have been declared. *McIntosh v. Flint, etc. R. R.*, 32 Fed. Rep. 350 (1887); S. C., 34 Fed. Rep. 582. See also *Smith v. Cork, etc. R'y, Ir. Rep.* 3 Eq. 356 (1869); 87 Fed. Rep. 612.

Hence, in *Dent v. London Tramways Co.*, L. R. 16 Ch. D. 344 (1880), it was held that the owners of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient for the maintenance and repair of the tramway for that year only; and that they were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been

compel the declaration of a preferred dividend, the common stockholders are proper but not necessary parties.¹

A stock dividend is legal in America, but cannot be forced upon stockholders in England.²

A bond dividend is legal, and even if it results in impairing the capital stock the court will not interfere if no harm can come from it.³

§ 273. *Arrears of preferred stock, to what extent payable subsequently—Remedies to enforce payment of arrears.*—When preferred stock is issued it is generally specified whether it is “cumulative” or “non-cumulative.” In the former case all arrears of dividends must be paid on the preferred stock before any dividend is paid on the common. In the latter case the contrary is the rule. Such are the rules where the question is expressly settled by the terms under which the stock was issued.

If preferred stock is issued without any mention of whether or not the dividends are cumulative, then the law makes them cumulative. As soon as there are net profits available for div-

improperly applied by them in paying dividends. But preferred shareholders are not entitled to a redemption of their stock in accordance with a statute if it would work an injustice to creditors and the other stockholders by taking all the money from the treasury and thereby crippling or wrecking the enterprise. *Culver v. Reno, etc. Co.*, 91 Pa. St. 367 (1879).

¹ *Thompson v. Erie R. R.*, 45 N. Y. 468 (1871). See also *Chase v. Vanderbilt*, 62 N. Y. 307 (1875), holding that the corporate officers are not necessary parties.

² See ch. XXXII, *infra*. In *Howell v. Chicago, etc. R'y*, 51 Barb. 378 (1868), where the rights of the preferred and common stockholders were clearly defined by the contract, a stock dividend of preferred stock was made to the preferred stockholders and of common stock to the common stockholders. In figuring the amount of dividend thus declared the court estimated the stock dividends at their market values. In *Wood v. Lary*, 124

N. Y. 83 (1891), the court sustained the court below (47 Hun, 550) in refusing to cancel a mortgage and bonds, the bonds having been issued as a bond dividend to preferred stockholders.

³ Where the company pays dividends on preferred stock by issuing certificates entitling the holder to bonds in exchange therefor, the company cannot afterwards refuse to deliver the bonds on the ground that the dividend was illegal or that such an issue of bonds was *ultra vires*, many bonds having already been so issued. *Chaffee v. Rutland R. R.*, 55 Vt. 110 (1882). Although a dividend may be illegal, yet “equity even would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles.” *Chaffee v. Rutland R. R.*, 55 Vt. 110 (1882).

idends, the corporation must pay the preferred dividends and all arrears thereon before a dividend is declared on the common stock. This is the well-settled rule at common law in this country¹ and in England.²

¹*Boardman v. Lake Shore, etc. R. R.*, 84 N. Y. 157 (1881); *Prouty v. Michigan, etc. R. R.*, 1 Hun, 655 (1874); *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 233 (1882); *Taft v. Hartford, etc. R. R.*, 8 R. I. 310 (1866); *West Chester, etc. R. R. v. Jackson*, 77 Pa. St. 321 (1875); *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875), per Cooley, J.; *Bates v. Androscoggin, etc. R. R.*, 49 Me. 491 (1860). There are cases, however, to the contrary, under peculiar provisions governing the dividends. When the preferred dividends are "dependent upon the profits of the particular year only," they are not cumulative. *Dent v. London Tramways Co.*, L. R. 16 Ch. D. 344 (1880). Preferred stock, under a provision that "should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock," is non-cumulative. *Hazeltine v. Belfast, etc. R. R.*, 79 Me. 411 (1887). See also dictum in *Cotting v. New York, etc. R. R.*, 54 Conn. 156 (1886).

Speaking of preferred stock, the court said in *Belfast, etc. R. R. v. Belfast*, 77 Me. 445 (1885), in a dictum and under a by-law in that case: "It was not intended in the present instance to guarantee a dividend. If a dividend is prevented in any one year by a deficit of earnings, it cannot be made up from the earnings of succeeding years." The preferred stock may be made non-cumulative. *Bailey v. Hannibal, etc. R. R.*, 1 Dill. 174 (1871); S. C., 3 Fed. Cas. 371; S. C., 17 Wall. 96 (1873). Where there is a statutory provision that dividends on the preferred stock shall not exceed a certain rate per cent, then there is no carrying over of arrears. *Elkins*

v. Camden, etc. R. R., 36 N. J. Eq. 233 (1882).

²*Henry v. Great Northern R'y*, 1 De G. & J. 606 (1857), aff'g 4 K. & J. 1; *Crawford v. Northeastern R'y*, 3 Jur. (N. S.) 1093 (1856); *Sturge v. Eastern Union R'y*, 7 De G., M. & G. 158 (1855); *Stevens v. South Devon R'y*, 9 Hare, 313 (1851); *Matthews v. Great Northern R'y*, 28 L. J. (Ch.) 375 (1859); *Corry v. Londonderry, etc. R'y*, 29 Beav. 263 (1860); *Webb v. Earle*, L. R. 20 Eq. 556 (1875); *Coates v. Notting-ham, etc. Co.*, 30 Beav. 86 (1861); *Smith v. Cork, etc. R'y*, Ir. Rep. 3 Eq. 356 (1869); S. C., Ir. Rep. 5 Eq. 65 (1870). The Companies Clauses Act of 1863 (26 and 27 Vict., ch. 118, § 14) provides that preference shares or stock shall be entitled to the preference dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and stock of the company; but that if in any year there are not profits available for the payments of the full amount of the preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company. In *Henry v. Great Northern R'y*, 1 De G. & J. 606 (1857), in which the matter of arrears in preferred dividends was elaborately considered, it was stated that the reason why such arrears ought to be held payable out of subsequent profits is that otherwise there would be a temptation to the corporation to set aside profits for improvements when the profits were too small for a dividend on both the common and the preferred shares, and not to set aside enough for improvements when

The right of the preferred stockholder to arrears of dividends is not deemed waived by delay, nor in any way except upon clear proof of intent to waive.¹ The dividends on the common stock may be made cumulative also before the preferred stock shares in the surplus profits remaining after preferred dividends are paid.²

§ 274. The remedy of a preferred stockholder, when the company proposes to pay dividends on the common stock before paying the arrears of dividends on preferred stock, is in a court of equity.³ But an action at law will lie if dividends have al-

the company made a dividend for both. Where each share in a company was converted into two half shares, one preferred, the other common or deferred, and the holders of the preferred half shares had, in a former year, acquiesced in the declaration of a dividend on the deferred half shares, while there was an arrearage of dividends on the preferred half shares, it was held that, although they had precluded themselves from making any claim to those specific arrears, they had not waived their right to claim subsequent arrears. *Matthews v. Great Northern R'y*, 28 L. J. (Ch.) 375 (1859). Dividends are not cumulative under the following provision: "The capital of the company is £150,000, divided into ten thousand ordinary shares of £10 each, and five thousand preference shares of £10 each. The holders of preference shares shall be entitled, out of the net profits of each year, to a preference dividend at the rate of £10 per cent per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend, the holders of ordinary shares shall be entitled to a like dividend at the rate of £10 per cent per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend." *Staples v. Eastman, etc. Co.*, [1896] 2 Ch. 303.

¹ *Boardman v. Lake Shore, etc. R.* R., 84 N. Y. 157 (1881). In *Smith v. Cork, etc. R'y*, Ir. Rep. 3 Eq. 356 (1869), the court held, under the facts of that case, that the preferred stockholders had not waived their right to arrears, although they had forborne and had taken part in inducing new capital to come in.

² When the preferred stock is entitled to participate in the surplus after the dividends are paid on the preferred, and "a dividend of the same amount upon the whole amount of paid-up capital" has been paid, arrears of dividends on the common stock as well as on the preferred must be paid before there is any surplus. *Allen v. Londonderry, etc. R'y*, 25 W. R. 524 (1877).

³ A suit in equity to restrain the corporation from declaring dividends on the common stock, and to compel an accounting and the payment of dividends on the preferred stock, is the proper remedy. *Boardman v. Lake Shore, etc. R.* R., 84 N. Y. 157 (1881); *Williston v. Michigan, etc. R. R.*, 95 Mass. 400 (1866). In this case the decision was that, when a preferred stockholder is entitled to share *pro rata* with holders of common stock in dividends over and above the preference, his remedy is not by an action at law against the corporation, but by suit in equity; and that there is no remedy against a *foreign corporation* in such case.

ready been declared and paid to the common stockholders in violation of the rights of the preferred stockholders.¹

When the arrears and dividends of preferred stock are recoverable, the interest on such arrears may be recovered from the time when moneys sufficient to pay the arrears were unlawfully used to pay dividends on the common stock instead of being used to pay the arrears on the preferred stock.²

§ 275. *Rights of the assignee or transferee of preferred stock in arrears of dividends.*—The transferee or assignee of preferred stock stands, in respect to arrears of dividends, in the shoes of his assignor or transferor. The undeclared arrears of dividends pass to him in the transfer of the stock, unless by the terms of the transfer the arrears are expressly separated from

In an action by a preferred stockholder in behalf of himself and others to enjoin the payment of dividends to common stockholders before the arrears of preferred dividends are paid, he need not join all the common stockholders as parties defendant. *Smith v. Cork, etc. R'y, Ir. Rep. 3 Eq. 356* (1869); *Prouty v. Michigan, etc. R. R., 1 Hun, 655* (1874), where an injunction was granted to restrain the declaring of dividends or making other disposition of the funds of the corporation until arrears on preferred stock should be paid; *Thompson v. Erie, etc. R. R., 45 N. Y. 468* (1871), involving an action to "enforce the declaration and payment of a dividend;" *Barnard v. Vermont, etc., 89 Mass. 512* (1863), holding that where certificates for an intended dividend had been issued payable at a future time when the company should be able to pay them, the final decision as to when the company is able to pay does not rest with the directors but with the court. Where the common stockholders in a reorganized company claim that the preferred stockholders are defrauding them, a preliminary injunction will not be ordered unless imminent danger is shown. *Mackintosh v. Flint, etc. R. R., 32 Fed. Rep. 350*

(1887). The plaintiff, by offering in evidence his certificate of stock and showing that no dividends have been paid, makes out a *prima facie* case entitling him to dividends and arrears. *Boardman v. Lake Shore, etc. R. R., 84 N. Y. 157* (1881).

¹ If dividends are declared and paid on the common stock, before paying the arrears of dividends on the preferred stock, the holders of the latter may collect such arrears by an action at law in assumpsit. *West Chester, etc. R. R. v. Jackson, 77 Pa. St. 321* (1875). In the case of *Bates v. Androscoggin, etc. R. R., 49 Me. 491* (1860), an action of debt for past-due dividends was sustained, although such dividends had not been declared, they having been earned. *Coey v. Belfast, etc. R'y, Ir. Rep. 2 C. L. 112* (1866), holding that an action at law will lie against a railway company for not giving to the plaintiff preferred stockholder the same dividend that it has given to others.

² *Boardman v. Lake Shore, etc. R. R., 84 N. Y. 157* (1881); *Prouty v. Michigan, etc. R. R., 1 Hun, 655* (1874). See *Adams v. Fort Plain Bank, 36 N. Y. 255* (1867). *Contra, Corry v. Londonderry, etc. R'y, 29 Beav. 263* (1860). Cf. ch. XXXII, *infra*.

the stock itself and reserved to the transferrer.¹ An assignment of preferred stock carries with it all arrears of dividends, and a subsequent assignment of arrears by the transferrer conveys nothing.²

§ 276. "*Special stock*" in *Massachusetts*.—In Massachusetts incorporated companies are permitted by statute³ to issue a peculiar kind of stock, known as "special stock." It is something essentially different from preferred stock.⁴ Its essential characteristics are that it is limited in amount to two-fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificate; the corporation is bound to pay a fixed half-yearly sum, or dividend, upon it as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock, and the issue of this special stock makes all the general stockholders liable for all debts and contracts of the corporation until the special stock is fully redeemed.⁵ Special stock can be issued only by a vote of three-fourths of the general stockholders of the company at a meeting duly called for that purpose.⁶ The

¹ *Jermain v. Lake Shore, etc. R'y*, 91 N. Y. 483 (1883); *Boardman v. Lake Shore, etc. R'y*, 84 N. Y. 157 (1881); *Hyatt v. Allen*, 56 N. Y. 553 (1874); *Manning v. Quicksilver Min. Co.*, 24 Hun, 360 (1881).

² *Manning v. Quicksilver Min. Co.*, 24 Hun, 360 (1881).

³ Stats. 1855, ch. 290; 1870, ch. 224, §§ 25, 39, cl. 4; Pub. Stats., ch. 106, §§ 42, 61, cl. 3.

⁴ *American Tube Works v. Boston Machine Co.*, 139 Mass. 5 (1885).

⁵ The statutes cited *supra*; *American Tube Works v. Boston Machine Co.*, 139 Mass. 5 (1885).

⁶ Stats. 1870, ch. 224, § 25. And the corporation must have a clerk, who is sworn, and who acts as recorder at such meeting. Stats. 1870, ch. 224, §§ 15, 18; Pub. Stats., ch. 106, §§ 23, 26. See also *Reed v. Boston Machine Co.*, 141 Mass. 454 (1886). This special stock is declared to be "a peculiar kind of stock, distinctly provided for by statute;" and it is important that

the marked distinction between preferred stock, as usually understood, and special stock, as authorized by the statutes cited in the notes, be kept plainly in view. *American Tube Works v. Boston Machine Co.*, 139 Mass. 5 (1885).

It was held, in accordance with this view, in the case last cited, that a vote of a corporation to issue special stock, at a meeting called to consider whether the corporation will issue preferred stock, is invalid; that a vote to issue special stock is invalid if the record of the meeting fails to show that three-fourths of the general shareholders voted for such issue; that the court will not presume, because the record showed that more than three-fourths of the shareholders were present at the meeting, that therefore three-fourths or more voted for the issue of special stock; and that a holder of special stock which is illegally issued cannot, by estoppel or otherwise, become

guaranty of dividends of special stock in Massachusetts is an absolute one, and not in any degree conditional upon the earning of sufficient profits by the corporation.¹

§ 277. *Interest-bearing stocks*.—Occasionally, instead of issuing preferred stock, a corporation issues ordinary common stock, together with a promise that the corporation will pay interest thereon. Such a promise is generally lawful, and may be enforced as a contract in the nature of an agreement to pay a dividend.² It is a lawful contract, however, only when it is to be interpreted as requiring payment from profits alone.³ Any contract on the part of a corporation to pay interest or dividends to its shareholders, without reference to the ability of the company to pay them out of its earnings, is wholly illegal and void.⁴ Moreover, the directors or corporate officers paying interest on stock out of the capital stock are jointly

a member of the corporation in respect of such shares.

¹ *Williams v. Parker*, 136 Mass. 204 (1884). See also *Allen v. Herrick*, 81 Mass. 274 (1860).

² *Barnard v. Vermont, etc. R. R.*, 89 Mass. 512 (1863).

³ *Richardson v. Vermont, etc. R. R.*, 44 Vt. 613 (1872); *Miller v. Pittsburgh, etc. R. R.*, 40 Pa. St. 237 (1861); *Cunningham v. Vermont, etc. R. R.*, 78 Mass. 411 (1859); *City of Ohio v. Cleveland, etc. R. R.*, 6 Ohio St. 489 (1856); *Wright v. Vermont, etc. R. R.*, 66 Mass. 68 (1853); *Waterman v. Troy, etc. R. R.*, 74 Mass. 433 (1857); *Barnard v. Vermont, etc. R. R.*, 89 Mass. 512 (1863). In *Ohio College v. Rosenthal*, 45 Ohio St. 183 (1887), where certificates of stock bearing interest were issued by a corporation which merely owned real estate, which was not organized for profit, never made any profit, never expected to, and had existed forty years, a suit by a stockholder to collect interest failed.

⁴ *Painesville, etc. R. R. v. King*, 17 Ohio St. 534 (1867); *Pittsburg, etc. R. R. v. Allegheny County*, 79 Pa. St. 210 (1875); *Pittsburg, etc. R. R. v. Al-*

legheny County, 63 Pa. St. 126 (1869); *Lockhart v. Van Alstyne*, 31 Mich. 76 (1875); *Troy, etc. R. R. v. Tibbits*, 18 Barb. 297 (1854); *Salisbury v. Metropolitan R'y*, 38 L. J. (Ch.) 249 (1869); *Re National, etc. Co.*, L. R. 10 Ch. D. 118 (1878). Cf. *Bardwell v. Sheffield Water-works Co.*, L. R. 14 Eq. 517 (1872). In *City of Ohio v. Cleveland, etc. R. R.*, 6 Ohio St. 489 (1856), interest payable by stock dividends was allowed by statute. A subscriber to stock which by its terms is to draw interest cannot defeat the subscription on the ground that the provision as to interest is illegal. *Evansville, etc. R. R. v. Evansville*, 15 Ind. 395 (1860). In *McLaughlin v. Detroit, etc. R'y*, 8 Mich. 100 (1860), a railroad company issued stock bearing interest. The court sustained it. The stock called for interest instead of dividends. Bonds were tendered to the stockholder in payment of such "interest." He declined the tender and sued for the interest money. The court sustained his suit. No question was raised as to paying such "interest" irrespective of profits.

and severally liable to refund the amounts so paid out.¹ A railway company may lawfully receive subscriptions to its capital stock upon the condition to pay interest thereon as soon as the amount of the subscription shall have been paid in, and until the completion of the road, or of some part thereof, or until the road shall have been put in operation.² It has been held that stipulated interest on stock cannot become a debt payable absolutely.³ The right of a subscriber drawing interest on his stock to participate in elections and general corporate meetings, and to exercise generally the rights of a shareholder, is the same as that of other stockholders.⁴ Where stockholders advance money in prepayment of calls, the company may pay them interest on the same up to the time that the call is due, even though such interest is paid out of capital.⁵

§ 278. *Rights of preferred shareholders on dissolution and on a reduction of the capital stock.*—Upon the dissolution of a corporation, and the distribution of its assets among the shareholders after the payment of the corporate indebtedness, it is the settled rule of law that, in the absence of any provision in the statutes, by-laws, certificate of stock, or contract under which the preferred stock was issued to the contrary, preferred shareholders have no priority over common stockholders. Their stock was preferred in respect of dividends, and not in reference to the capital stock. The assets of the corporation are to be distributed as though the preferred shares had been common shares. The preferred shareholder in the distribution becomes

¹ *Re National, etc. Co.*, L. R. 10 Ch. D. 118 (1878).

² *Milwaukee, etc. R. R. v. Field*, 12 Wis. 340 (1860); *Racine County Bank v. Ayers*, 12 Wis. 512 (1860); *Miller v. Pittsburgh, etc. R. R.*, 40 Pa. St. 237 (1861); *Waterman v. Troy, etc. R. R.*, 74 Mass. 433 (1857). The only effect of an agreement by the corporation to pay such interest is to enable those stockholders with whom the agreement is made to claim a dividend and arrears of dividends before other stockholders receive anything. This is nothing more nor less than a preferred dividend.

³ *Barnard v. Vermont, etc. R. R.*, 89

Mass. 512 (1863). Nevertheless, the relation of debtor and creditor is created to the extent of the interest stipulated for. *McLaughlin v. Detroit, etc. R'y*, 8 Mich. 100 (1860).

⁴ *McLaughlin v. Detroit, etc. R. R.*, 8 Mich. 100 (1860).

⁵ *Lock v. Queensland Inv. etc. Co.*, [1896] 1 Ch. 397. A construction company owning the stock of a gas company, upon selling such stock, on payments to be made in instalments, may agree to allow interest on the instalments paid in advance. *Hetfield v. Addicks*, 154 Pa. St. 1 (1893); *Porter v. Beacon Con. Co.*, 154 Pa. St. 8 (1893).

a common shareholder.¹ Thus, where the preferred stock is not preferred as to assets, and a reorganization is had by selling out the property of the company to a new company for preferred and common stock in the new company, this preferred and common stock of the new company must be distributed ratably among both the common and preferred stockholders of the old company. A preferred stockholder in the old cannot be given the preferred stock in the new. A common stockholder may enjoin such a distribution. He is entitled to his share of the new preferred.² But where a railroad may, by statute, consolidate with another railroad on such terms as a majority of the stockholders approve, the terms may be that four preferred shares in the old shall receive five preferred shares in the new, and two shares of common in the old shall receive one preferred share in the new. It is not such a dissolution as entitles the common to share equally with the preferred.³ Where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though

¹ The House of Lords has held that, upon the dissolution of a corporation having preferred stock and common stock, the surplus assets, after repayment of the paid-up capital, the common stock not having been paid up, is divisible among all the stockholders, common and preferred, in proportion to their holdings. *Birch v. Cropper*, 14 App. Cas. 525 (1889), reversing the court below. See also *Re London India Rubber Co.*, L. R. 5 Eq. 519 (1868); *Re Bridgewater Nav. Co.*, L. R. 39 Ch. D. 1 (1888), a case where there was a large surplus; *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181 (1880), a dictum, the court holding, however, that under the statutes of the state the preferred stockholders had a preference as to assets also, the statute providing for a division of the surplus after payment to preferred stockholders. Stock with guaranteed *dividends* is stated in *Gordon v. Richmond, etc. R. R.*, 78 Va. 501 (1884), to give a preference as to dividends, but not of the stock on a wind-

ing up. Upon dissolution the court may and will call in unpaid subscriptions, where this is necessary in order to make a proper distribution. *Re Sheppard's, etc. Co.*, 70 L. T. Rep. 3 (1893). In *Griffith v. Paget*, L. R. 6 Ch. D. 511 (1877); *S. C.*, L. R. 5 Ch. D. 894, it was held that where the company is dissolved by a consolidation with another company under a statute, the stockholders of the old being entitled to exchange their stock for stock in the new, the preferred stock is not entitled to preferred stock in the new. On a winding up, if it turns out that the profits had been systematically overestimated for a number of years, thereby depriving common stockholders of the dividends, an account should be taken and such dividends should be paid. *Re Bridgewater Nav. Co.*, [1891] 2 Ch. 317. See also *S. C.*, [1891] 1 Ch. 155.

² *Simpson v. Palace Theater*, 69 L. T. Rep. 70 (1893). See also § 270, *supra*.

³ *Hale v. Cheshire R. R.*, 161 Mass. 443 (1894).

thereafter the corporation becomes insolvent and is wound up before such profits are declared to be dividends. The creditors of the corporation are entitled to the corpus of the estate, but not to any profits. If there is preferred stock such profits go to that stock.¹

Where, however, a preference as to capital has been expressly contracted for,² or is given by a statute,³ the rule is, of course, otherwise.

If the capital stock is reduced, the preferred stock is reduced proportionately with the common, unless the preferred stock is preferred as to assets as well as dividends.⁴ Where the pre-

¹ *Bishop v. Smyrna, etc. R'y*, [1895] 2 Ch. 265.

² *Re Bangor, etc. Slate Co.*, L. R. 20 Eq. 59 (1875). In the issue of preferred stock there may be a provision that any amounts which have to be paid to corporate creditors on the winding up shall be paid by the common stockholders. *Welton v. Saffery*, [1897] A. C. 299. The preference may, by express agreement, be made to give a preference to capital as well as to profits. *Hamlin v. Toledo, etc. R. R.*, 78 Fed. Rep. 664 (1897). Founders' shares are one species of preferred or deferred stock. See ch. I, *supra*. Where, on dissolution, the founders' shares were to have one-fifth of the surplus assets, the words "surplus assets" are construed to be the assets remaining after paying the debts and also paying back whatever the stockholders had originally paid in. *Re New Transvaal Co.*, [1896] 2 Ch. 750. 86 Fed. Rep. 929.

³ *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 181 (1890).

⁴ When the capital stock is reduced by decreasing the par value of the stock, the preferred stock may be reduced equally with the rest. *Re Barrow, etc. Co.*, L. R. 39 Ch. D. 582 (1888). Where, in consequence of losses, the capital stock is reduced, as allowed by the charter, by reducing the par value of the stock one-half,

the preferred stock as well as the common is reduced one-half. *Bannatyne v. Direct, etc. Co.*, L. R. 34 Ch. D. 287 (1886). But not where the preferred stock is preferred as to assets as well as dividends, unless all the preferred stockholders assent thereto. *Re Quebrada R'y, etc. Co.*, L. R. 40 Ch. D. 363 (1889). Where a company has not issued or has acquired some of its stock, it may reduce its capital stock by canceling the part owned by it, although it is all preferred, or all common, or part of both. *Re Gatling Gun*, L. R. 43 Ch. D. 628 (1890). Where there is both common and preferred stock, it is legal for the company to reduce the common stock without reducing the preferred. *Re Agricultural Hotel Co.*, [1891] 1 Ch. 396. Under the English statutes, where the capital stock consists of stock and deferred stock, the former being practically preferred stock and the latter common stock, a reduction of the whole capital stock may be effected, with the consent of the common stockholders, by canceling a part of the common stock and having the remainder become preferred stock (in other words, by wiping out all preferences), even though some of the preferred stockholders objected, there being originally no preferences as to assets. *Re Hyderabad Co.*, 75 L. T. Rep. 23 (1896). In *National*

ferred stock was to have five per cent and the common stock seven per cent, and the remaining profits were to go equally to the common stock and to founders' shares, and a reduction of capital is made by reason of losses, the reduction may be made by canceling the founders' shares and part of the common stock.¹

Dwelling Soc., Lim., 78 L. T. Rep. 144 (1898), by unanimous consent, upon the reduction of the capital stock of a company having both preferred and common stock, the capital stock having become impaired, all the stock became common stock, the preferred stockholders reducing their holdings three-fifths and the common stock-

holders reducing their holdings nine-tenths.

¹ *Re* London, etc. Inv. Corp., [1895] 2 Ch. 860, the court saying that, "where there are different classes of shares, the loss on a reduction ought to fall on those who would have to bear it if there were a winding up."

CHAPTER XVII.

INCREASE AND REDUCTION OF THE CAPITAL STOCK AND OVER- ISSUED STOCK.

§ 279. Introductory.

A. LEGAL INCREASE OR REDUCTION OF CAPITAL STOCK.

- 280. Power of the legislature to authorize an increase or reduction.
- 281. Power of the corporation to increase or reduce the capital stock.
- 282. Effect of purchase by a corporation of shares of its own stock.
- 283. The issue of bonds convertible into stock.
- 284. Power of a court to direct an increase or reduction.
- 285. Shareholders, not directors, should authorize the increase.
- 286. Prior right of the old stockholders to buy the new stock.
- 287. Issue of an increase of stock by a stock dividend.
- 288. Liability of the shareholder upon an increase of the capital stock — Irregularities in increasing the stock.
- 289. Rights and liabilities of the shareholder upon a reduction of the capital stock.

§ 290. Changes in the number or par value of the shares.

B. ILLEGAL INCREASE OF STOCK, BEING OVERISSUED STOCK.

- 291. Unauthorized increase of stock may amount to overissued stock.
- 292. Overissued stock is absolutely void.
- 293. Liability of the corporation on overissued stock — Who is a *bona fide* holder.
- 294. Defenses of the corporation to such actions.
- 295. Personal liability of the officers of the corporation on overissued stock.
- 296. Liability of the vendor of overissued stock.
- 297. Equity will enjoin voting, transferring, and dividends on such stock, and will adjust the rights of all parties.
- 298. Subscriber's right to defeat a subscription to overissued stock and to recover back money paid thereon.

§ 279. *Introductory.*—The capital stock of all incorporated companies is generally fixed by the charters which give them an existence. Frequently, however, in the progress of the corporate enterprise, it happens that the capital stock is found to be too small or too large for the demands of the business, and there is a desire to change it. This change can be made lawfully only under certain conditions and limitations. These are the subject of this chapter.

A. LEGAL INCREASE OR REDUCTION OF CAPITAL STOCK.

§ 280. *Power of the legislature to authorize an increase or reduction.*—It is clearly constitutional for the legislature, upon

granting a charter, to fix the capital stock and to authorize the corporation to increase or decrease that capital stock. But where the legislature did not authorize the corporation to vary its capital stock, it is a serious question whether, as against a dissenting stockholder, the capital stock may be subsequently changed, even under the authority of a legislative enactment. The better and prevailing opinion is that it may be; that the statute authorizing the change is constitutional; and that the increase or reduction is valid.¹

A different conclusion may be reached, however, as regards the rights of creditors of the corporation. It is clear that the legislature cannot constitutionally authorize a reduction of the capital stock in prejudice of their rights as to an existing corporate indebtedness.²

§ 281. *Power of the corporation to increase or reduce the capital stock.*—In the absence of express authority from the state, a corporation has no power whatsoever to increase or reduce the amount of its stock, and any attempt upon the part of the corporation, either by the corporate officers or by the stockholders, to do so is wholly illegal and void.³ Accordingly it is not competent for a corporation having a fixed capital stock, and being without legislative authority to change it, to reduce that capital to the amount actually paid in.⁴

Where the attempted increase or reduction of the stock is not authorized by the charter, not even the unanimous assent and agreement of all the parties concerned will legalize it. It is void.⁵

¹See ch. XXVIII, *infra*, on this subject.

²See ch. XXVIII, *infra*.

³Scovill v. Thayer, 105 U. S. 143, 148 (1881); Sutherland v. Olcott, 95 N. Y. 93, 100 (1884); New York, etc. R. R. v. Schuyler, 34 N. Y. 30 (1865); Mechanics' Bank v. New York, etc. R. R., 13 N. Y. 599 (1856); Grangers', etc. Ins. Co. v. Kamper, 73 Ala. 325 (1882); Moses v. Ocoee Bank, 1 Lea (Tenn.), 398 (1878); Ferris v. Ludlow, 7 Ind. 517 (1856); Lathrop v. Kneeland, 46 Barb. 432 (1866); Salem Mill-Dam Corp. v. Ropes, 23 Mass. 23 (1827). Parker, C. J., in the case last cited,

says that, if a corporation is "created with a fund limited by the act, it cannot enlarge or diminish that fund but by license from the legislature."

⁴Droitwich Patent Salt Co. v. Curzon, L. R. 3 Exch. 35, 42 (1867).

⁵See § 292, *infra*. Where a corporation, having power to increase its capital \$100,000, increases it \$1,100,000, the whole increase is void, and subscribers to it are not liable thereon to corporate creditors. Kampman v. Tarver, 87 Tex. 491 (1895). The purchasers of stock which they suppose is the original capital stock, but which is really increased capital

A subscriber for stock may defeat an action on his subscription by the defense that the stock subscribed for is part of an increase of stock which the statutes do not allow to be made.¹ Where there is no statutory authority for the increase, and an attempted increase is made under a by-law, a subscriber for the increased capital stock is not liable even to corporate creditors, and even though he acted as a stockholder.² Where the statutes do not fix or limit the capital stock, and give the corporation power to fix it by by-law, the capital stock may be increased from time to time by amending the by-law.³

A different rule prevails, however, where the increase of capital stock is authorized by charter or statute, but is informally made. In such a case the increase is valid as against all parties excepting the state which created the corporation.⁴

An authority to reduce the number of shares cannot be inferred from the authority to increase, and a reduction with no other warrant of authority than a right to increase will be held void.⁵

If the charter of the corporation provides that the capital stock shall not be less than a specified sum, nor greater than another specified sum, the corporation may commence business with less than the latter sum, and afterwards increase the capital until the limit is reached.⁶

An injunction is the proper remedy to prevent an illegal increase or reduction of the capital stock of a corporation. But an injunction against the issue of new stock by a foreign corporation will be dissolved where the courts of the state where the corporation was created decide such issue of stock to be legal.⁷

stock, cannot sustain a bill to cancel the original capital stock, even though the latter is held by the parties who issued the increased stock, without amending the charter as required by statute. *Byers v. Rollins*, 13 Colo. 22 (1889).

¹ *Laredo Imp. Co. v. Stevenson*, 66 Fed. Rep. 633 (1895).

² *Ross-Meehan, etc. Co. v. Southern, etc. Co.*, 72 Fed. Rep. 957 (1896). See also § 298, *infra*.

³ *Peck v. Elliott*, 79 Fed. Rep. 10 (1897).

⁴ See § 288, *infra*.

⁵ *Sutherland v. Olcott*, 95 N. Y. 93 (1884); *Seignouret v. Home Ins. Co.*, 24 Fed. Rep. 332 (1885).

⁶ *Gray v. Portland Bank*, 3 Mass. 364 (1807); *Somerset, etc. R. R. v. Cushing*, 45 Me. 524 (1858). In the case last cited it is held that, where the number of shares is not fixed by charter, the directors or shareholders must fix it before an assessment can be levied, and that then, if the number fixed is greater than the number taken, it may be reduced subsequently.

⁷ *O'Brien v. Chicago, etc. R. R.*, 53

§ 282. *Effect of purchase by a corporation of shares of its own stock.*—If a corporation has power to reduce its capital stock, it has been held that it may do so by purchasing and retiring a portion of its shares.¹ Whether such a purchase by a corporation will operate to diminish the capital stock is a question of intention. If a reduction is authorized by charter or by statute, and the formalities of making the reduction have been complied with, and the proper corporate authorities purchase for the corporation shares of its own stock and consider the capital stock thereby reduced, the law holds that a reduction of the capital stock is thereby made. But if any of these elements are wanting, then no reduction is effected, and the corporation may at any time sell and re-issue the stock. Hence a mere transfer of shares to the corporation, whether the corporation assumes to buy the stock or the stockholders simply to surrender it, will in no case constitute a reduction, when the corporation lacks authority from the legislature to reduce its capital. Even if the shareholder is held to be released by such a transfer, still the stock survives and subsists. The corporation is merely the holder of it, and may sell and re-issue it at any time.²

Barb. 568 (1868). An increase of the capital stock without warrant of authority is called an overissue of stock—a subject fully considered in the succeeding sections of this chapter. The issue of new stock by the corporation cannot be enjoined where neither the corporation nor any of its directors are parties to the action. *White v. Wood*, 129 N. Y. 527 (1892).

¹ Quoted and approved in *Tulare, etc. Dist. v. Kaweah, etc. Co.*, 44 Pac. Rep. 662 (Cal., 1896). The corporation may purchase its own stock from a part of the stockholders as a means of reducing its capital stock. *British, etc. Corp. v. Couper*, [1894] A. C. 399. Where a corporation uses its profits to buy its own stock, the remaining stockholders are not liable on the statutory liability attaching to the stock so purchased by the corporation. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 35 S. W. Rep. 337 (Tex.,

1896); *State v. Smith*, 48 Vt. 266 (1876), dictum. So also *City Bank v. Bruce*, 17 N. Y. 507 (1858). *Contra*, *Currier v. Lebanon Slate Co.*, 56 N. H. 262 (1875). Where a company has not issued or has acquired some of its stock, it may reduce its capital stock by canceling the part owned by it, although it is all preferred, or all common, or part of both. *Re Gatling Gun*, L. R. 43 Ch. D. 628 (1890).

² The purchase by a corporation of its own stock does not necessarily decrease the capital stock. "It might or might not have that effect, at the option of the company, and would require, I think, some manifestation of such an intent to produce that result." Such stock may be re-issued at any time. *City Bank v. Bruce*, 17 N. Y. 507 (1858). Where a corporation has power to reduce its capital stock it may purchase from one of its stockholders his stock and give him in

§ 283. *The issue of bonds convertible into stock.*—Where the charter of a railway corporation authorizes the issue of bonds, convertible at the option of the holder into stock, such an issue may be made, even though, if the bonds were converted into stock, the capital stock would thereby be increased beyond the amount fixed by the charter. The statute or charter authorizing such an issue of bonds is held to thereby authorize, by necessary implication, the right to increase the capital stock to the extent required in the fulfillment of the contract to allow the bonds to be converted into stock.¹

The issue of a bond convertible into stock must comply with the rules regulating the issue of stock.² The holder of the bonds may demand stock therefor at any time; and even though the

payment therefor his *pro rata* share of the assets of the corporation, the corporation being solvent. This amounts to a reduction of the capital stock, and a subsequent creditor of the corporation cannot complain. *Shoemaker v. Washburn, etc. Co.*, 73 N. W. Rep. 333 (Wis., 1897). In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issued. If, however, in the re-issue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. *Belknap v. Adams*, 22 S. Rep. 382 (La., 1897). A purchase by the corporation itself does not amount to a reduction of the capital stock. *Western Imp. Co. v. Des Moines Nat. Bank*, 72 N. W. Rep. 657 (Iowa, 1897). See § 314, *infra*, and *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260 (1828). In an early case a transfer to the corporation seems to have been regarded as a reduction of the capital stock *pro tanto*. *Percy v. Millaudon*, 3 La. 568, 587 (1832). It is important to note in this connection that the purchase of its own stock by a corporation is an act not permitted at all in England, and not

permitted in this country when corporate creditors' rights would be prejudiced thereby. See §§ 309–312, *infra*. It was held in New England, etc. Ins. Co. v. Phillips, 141 Mass. 535 (1886), that a purchase by a corporation of certificates of indebtedness effects a cancellation, even though the certificates have a voting power.

¹ *Belmont v. Erie R. R.*, 52 Barb. 637, 669 (1869); *Ramsey v. Erie R'y*, 38 How. Pr. 193, 216 (1869). When bonds are convertible by their terms into stock, but the company has no stock, specific performance will not be decreed, but damages given. *Chaffee v. Middlesex R. R.*, 146 Mass. 224 (1888). Where the stock of a land corporation is convertible into land, a stockholder may enforce the change by bill in equity. *Franco-Texan Land Co. v. Bousselet*, 70 Tex. 422 (1888). The bonds may provide that the holder may take certain lots of land in satisfaction thereof. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885).

² Where a corporation has power to increase its capital stock, it may issue bonds at fifty per cent of their par value, convertible into stock upon payment of the other fifty per cent. *Van Allen v. Illinois Central R. R.*, 7 Bosw. 515 (1861).

demand is made just before a dividend is declared, he is entitled to the stock and dividend.¹

An option to convert stock into bonds must be exercised within a reasonable time if the option itself contains no limit.²

Where bonds are convertible into stock, the holder may demand conversion into the stock of a new consolidated corporation that has assumed all the claims and liabilities of the old.³

§ 284. *The power of a court to direct an increase or reduction.*—The courts have no power, by mandate or decree or in any other manner, to effect an increase or reduction of the capital stock of a corporation. Hence, where the whole capital stock has been issued, and the corporation, by reason of its misconduct or mistakes, is bound to issue new certificates to the owner of the stock or pay him damages, the court can give

¹ *Jones v. Terre Haute, etc. R. R.*, 57 N. Y. 196 (1874). Where bonds are convertible into stock, a bondholder is entitled to stock equal in par value to the par value of his bonds, but is not entitled, in addition thereto, to past stock dividends declared on such stock. *Sutliff v. Cleveland, etc. R. R.*, 24 Ohio St. 147 (1873). In a suit by holders of bonds convertible into stock against the corporation for refusal to allow such conversion, the plaintiffs must allege that they still hold the bonds. *Denney v. Cleveland, etc. R. R.*, 28 Ohio St. 108 (1875). A corporation with authority to increase its capital stock may lawfully issue new shares and receive in payment therefor the bonds of the corporation. *Lohman v. New York, etc. R. R.*, 2 Sandf. (N. Y. Super. Ct.) 39 (1848); *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); *aff'd*, 109 N. Y. 659.

² *Catlin v. Green*, 120 N. Y. 441 (1890). Where the subscribers for stock have an option to exchange their stock for bonds of the company, and fail to exercise that option for nine years, when the company has passed into the hands of a receiver and the stock become worthless, the

right is gone. The option, not being limited in time, must be exercised within a reasonable time. *Catlin v. Green*, 120 N. Y. 441 (1890).

³ *Day v. Worcester, etc. R. R.*, 151 Mass. 302 (1890). When by statute the consolidated company is liable for the contracts of the old companies, it must issue stock in exchange for bonds of the old company which were convertible into stock. *India Mut. Ins. Co. v. Worcester, etc. R. R.*, 25 N. E. Rep. 975 (Mass., 1890). Where a bondholder has a right to convert his bonds into stock, a consolidation cannot deprive him of that right until after he has been notified of the intended consolidation and given an opportunity to exercise his rights. *Rosenkrans v. Lafayette, etc. R. R.*, 18 Fed. Rep. 513 (1883). In *Cayley v. Cobourg, etc. Co.*, 14 Grant's Ch. Rep. (Can.) 571 (1868), where the bondholders of a railroad company had a right to convert their bonds into stock, it was held that a consolidation authorized by statute did not destroy this right of the bondholders, but that the consolidated company must issue the stock in exchange for the bonds.

judgment for damages only. It cannot order the corporation to issue stock, since to do so would be to direct an overissue.¹

In Massachusetts a later and better rule prevails, to the effect that the corporation in such a case may be compelled to issue the stock, and in order to prevent an illegal overissue it must purchase an equal amount of shares in the market.²

Where corporate officers enter into a contract to pay for services or property wholly or partially in stock of the corporation, a court will not, after the whole amount of the stock has been issued, decree a specific performance of the contract, but the aggrieved party is remitted to his action for damages.³

§ 285. *Stockholders, not directors, should authorize the increase.*—An increase or reduction of the capital stock of a corporation is such a fundamental change in its affairs that, although it has been duly authorized by act of the legislature or by the charter of incorporation, it cannot lawfully be effected merely by the act or assent of the board of directors,⁴ but must

¹ "When a corporation has issued certificates of stock (which are valid and not void) to the full extent of all the shares which by law and the constitution of the company it may issue, no court can order the issuance of other shares, because in that respect the powers of the corporation have been exhausted." *Smith v. North American Min. Co.*, 1 Nev. 423 (1865); *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418 (1851); *Mechanics' Bank v. New York, etc. R. R.*, 13 N. Y. 599 (1856). In an action for the conversion of shares, the question of an increase or reduction not being involved, it was said that "to require a new issue of the stock might, in cases like this, where shares have gone into the hands of innocent purchasers, involve an overissue of stock, which would be illegal." *Baker v. Wasson*, 59 Tex. 140 (1883); S. C., 53 Tex. 150 (1880).

² This rule, with an equitable adjustment of the conflicting interests of all the parties, where an owner of stock was deprived of it by forgery, was established by the supreme judi-

cial court of Massachusetts in the case of *Machinists' Nat. Bank v. Field*, 126 Mass. 345 (1879). See also *Pratt v. Machinists' Nat. Bank*, 123 Mass. 110 (1877), and *Boston, etc. R. R. v. Richardson*, 135 Mass. 473 (1883), each of the three cases growing out of the same transaction.

³ *Finley, etc. Co. v. Kurtz*, 34 Mich. 89 (1876). In this case the court said that, where the capital stock may be increased by vote of the stockholders, "it certainly could not be within the implied powers of any corporate officer to obligate the corporation to any such increase, and thus indirectly do what the law permits to be done only by the body of corporators specially convened for the purpose." In actions against corporations for conversion of stock, the relief demanded is usually in the alternative, being either for an issue of a certificate of stock, or damages in lieu thereof.

⁴ *Percy v. Millaudon*, 3 La. 568, 585 (1832); *Eidman v. Bowman*, 58 Ill. 444 (1871); *Finley, etc. Co. v. Kurtz*, 34 Mich. 89 (1876); *Crandall v. Lincoln*, 52 Conn. 73, 99 (1884); *People v.*

be authorized by the stockholders at a corporate meeting. Where, however, the directors have made the change, and the stockholders have acquiesced therein, they are as fully bound as though the increase or reduction had been expressly authorized at a corporate meeting. The stockholders' assent to the change may be shown as conclusively by their conduct and acquiescence as by a formal vote.¹ The power to increase the capital stock may be vested in the directors.² Although the stockholders have regularly voted to increase the capital stock, in pursuance of adequate legislative authority, still, inasmuch as the increase is not accomplished until the shares are actually issued, the vote may be reconsidered in a lawful manner at any time before the stock is finally issued.³ The courts will not inquire into the necessity of an increase.⁴

§ 286. *Prior right of the old stockholders to buy the new stock.*—When the capital stock of a corporation is increased by the issue of new shares, each holder of the original stock has a right to offer to subscribe for and to demand from the corpora-

Parker Vein Coal Co., 10 How. Pr. 543 (1854). See also *Railway Co. v. Allerton*, 18 Wall. 233 (1873). It is for the stockholders to increase the capital stock, and a contract of the directors in reference to making an increase is not enforceable. *McNulta v. Corn Belt Bank*, 164 Ill. 427 (1897). Cf. *Chicago v. Joney*, 60 Ill. 383 (1871); *Re Wheeler*, 2 Abb. Pr. (N. S.) 361 (1866); *People v. Twaddell*, 18 Hun, 427, 432 (1879); *State v. Merchant*, 37 Ohio St. 251 (1881). See also §§ 708, etc., *infra*.

¹ *Sewell's Case*, L. R. 3 Ch. App. 181 (1868); *Lane's Case*, 1 De G., J. & S. 504 (1863); *Payson v. Stoevers*, 2 Dill. 427 (1873); S. C., 19 Fed. Cas. 27. See also ch. XLVII. *infra*, relative to mortgages; but see also § 288, *infra*. An allegation of ratification must not be in general terms, but must set out specifically the facts constituting the ratification. *Eidman v. Bowman*, 58 Ill. 444 (1871). An amendment of the charter which allows the directors instead of the stockholders to author-

ize an increase of the capital is not such a fundamental change in the constitution of the corporation as will operate to release non-assenting stockholders from the obligation on their stock. *Payson v. Withers*, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29; *Payson v. Stoevers*, 2 Dill. 427; S. C., 19 Fed. Cas. 27.

² *Sutherland v. Olcott*, 95 N. Y. 93 (1884). Their resolution that "the capital stock of this company be and the same is hereby increased to —" is sufficient to effect the increase. *Sutherland v. Olcott*, 95 N. Y. 93 (1884).

³ *Terry v. Eagle Lock Co.*, 47 Conn. 141 (1879). In this case the court said: "It cannot be said that the capital is actually increased until the new stock is subscribed for, at least. Until then there is an element of uncertainty about it. It may never be taken. It is very clear that the vote to increase is not *per se* an increase."

⁴ *Jones v. Concord, etc. R. R.*, 30 Atl. Rep. 614 (N. H., 1892).

tion such a proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. This pre-emptive right of the shareholder in respect to new stock is well recognized.¹ It has been held, however, that where the statute provides for the issue of stock in payment for property, increased capital stock may be so issued without the same being first offered to existing stockholders.²

¹ *Gray v. Portland Bank*, 3 Mass. 364 (1807); *Eidman v. Bowman*, 58 Ill. 444 (1871); *Reese v. Bank of Montgomery*, 31 Pa. St. 78 (1855); *Jones v. Morrison*, 31 Minn. 140 (1883); *Bank of Montgomery v. Reese*, 26 Pa. St. 143 (1856). Cf. *Curry v. Scott*, 54 Pa. St. 270 (1867); *Miller v. Illinois Cent. R. R.*, 24 Barb. 312 (1857); *Wilson v. Bank of Montgomery County*, 29 Pa. St. 537 (1857); *Mason v. Davol Mills*, 132 Mass. 76 (1882). A sale of shares of the original capital stock carries with it as an incident the right which the vendor had previously acquired by subscription to shares of increased capital stock. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893); *Biddle's Appeal*, 99 Pa. St. 278 (1882), in which the option to subscribe for new stock was sold by an executor; *Pratt v. American Bell Tel. Co.*, 141 Mass. 225 (1886), where one who held notes convertible into stock at a future time sought to establish his right as a stockholder to an equitable share of an increase of capital stock to which shareholders had a first right to subscribe upon favorable terms. The court held that the suit could not be maintained, on the ground that until he had converted the notes into stock he had no rights as a stockholder; *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294 (1860), where the charter varied the rule; *Re Wheeler*, 2 Abb. Pr. (N. S.) 361, 363 (1866), in which it was said that, if new stock is not apportioned among old stockholders, it should be sold at public sale to the highest bidder, so that all may share in the gains arising from its sale;

Miller v. Illinois Cent. R. R., 24 Barb. 312 (1857), that a stockholder who holds a receipt from a corporation for money payable on demand in cash, or, at his option, in new stock when issued, has no interest in such stock as a shareholder until he has elected to take it instead of the cash. In Massachusetts this right is prescribed in the statutes. Pub. Sts. (1882), ch. 106, § 37; ch. 112, § 53. In Massachusetts increased capital, if worth more than par, must in certain cases, by statute, be sold at public auction. See *Attorney-General v. Boston, etc. R. R.*, 109 Mass. 99 (1871). Where the statute requires that such of the increased capital stock as is not taken by the stockholders shall be sold at public auction, the words of the statute as to the manner of sale must be strictly followed. *Smith v. Franklin Park, etc. Co.*, 168 Mass. 345 (1897). A pledgee of stock is not entitled to this right to take up new shares. The right belongs to the pledgor. *Miller v. Illinois Cent. R. R.*, 24 Barb. 312 (1857). Preferred stock is entitled to subscribe for its proportionate part of new stock the same as the common stock, even though the preferred stock is limited absolutely as to dividends. *Jones v. Concord, etc. R. R.*, 30 Atl. Rep. 614 (N. H., 1892). The stockholders, in increasing the capital stock, may prescribe the mode of issue. *Stephenson v. Vokes*, 27 Ont. Rep. (Can.) 691 (1896).

² *Meredith v. New Jersey, etc. Co.*, 37 Atl. Rep. 539 (N. J., 1897). Although a person holds a majority of the stock and causes his friends to be made di-

Moreover, the general rule applies only when the capital is actually increased, and not to a re-issue of any portion of the original stock.¹ It applies, however, to such part of the original capital stock as is issued long after business has been commenced by the company.² Especially is this the rule where the directors issue such new stock to themselves or their friends in order to control an election or make a profit.³ The right

rectors, yet he may sell property to the corporation and take stock in payment, if the transaction is a fair one. *Russell v. Rock, etc. Co.*, 39 Atl. Rep. 21 (Pa., 1898).

¹*State v. Smith*, 48 Vt. 266 (1876); *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260 (1828); *Curry v. Scott*, 54 Pa. St. 270 (1869), in which *Reese v. Bank of Montgomery*, 31 Pa. St. 78 (1855), was said to decide "nothing more than that untaken stock is held by the corporation in trust for the corporators, and must be disposed of for the benefit of all;" and it was held that a stockholder has no greater right than a stranger to subscribe to original stock untaken. Cf. *Eidman v. Bowman*, 58 Ill. 444 (1871); *Gray v. Portland Bank*, 3 Mass. 364 (1807). See also §§ 65, 70, *supra*, and §§ 615, 653, *infra*. A contract of a corporation that a patentee shall have a certain percentage of any increase of stock does not apply to the capital stock of a consolidated company, although the former corporation is one of those making up the consolidation. *Einstein v. Rochester, etc. Co.*, 146 N. Y. 46 (1895). The case of *Hirsch & Co. v. Burns*, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business of the company to another company without protecting such option.

²*Sims v. Street R. R.*, 37 Ohio St. 556 (1882). See also § 65, *supra*.

³Where, long after the company

has commenced business, it has disposed of its property and is ready to declare a five hundred per cent dividend, the directors issue to themselves at par that part of the original capital stock which never had been issued, it is a fraud on the remaining stockholders. *Arkansas, etc. Soc. v. Eichholtz*, 45 Kan. 164 (1891). See also *Hilles v. Parrish*, 14 N. J. Eq. 380 (1862). Where a director issues to himself, at par, stock belonging to the corporation and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91 (1890). In the case of *Reese v. Bank of Montgomery*, 31 Pa. St. 78 (1855), the court held that where a part of the authorized capital stock remained untaken, and a resolution of the directors was carried into effect by which the untaken portion of the stock was issued to those shareholders not in arrears upon shares previously taken, to the exclusion, as to the new shares, of those in arrears upon the original issue, it was held an invalid discrimination and an unlawful imposition of a penalty upon those in arrears. In regard to the right to subscribe for the unissued portion of the original capital stock, see also § 70, *supra*, and § 653, *infra*. Where a corporation has an authorized capital of \$5,000, but only \$2,500 are directed by the stockholders to be issued, it is illegal and fraudulent to issue the

must be exercised within a fixed or a reasonable time; and if the shareholder fails to avail himself of it, he is barred, by laches or acquiescence, of his right to contest a disposition of the stock to some one else.¹ Where there are four classes of stock new stock may be common stock.² Any stockholder may sell his right to subscribe for his proportion of the new stock.³ The corporation cannot compel the old stockholders, upon their

remaining authorized capital without giving the existing stockholders a prior right to subscribe to such increased capital *pro rata*. Directors elected by reason of such illegal issue will be enjoined from acting where they are about to change the whole policy of the company. *Humboldt, etc. Assoc. v. Stevens*, 34 Neb. 528 (1892). See also preceding note.

¹ *Terry v. Eagle Lock Co.*, 47 Conn. 141 (1879); *Hart v. St. Charles St. R. R.*, 30 La. Ann. 758 (1878); *Brown v. Florida Southern R'y*, 19 Fla. 472 (1882). Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. A stockholder who was not present at the stockholders' meeting is not bound by a ratification by such meeting. *Morris v. Stevens*, 178 Pa. St. 563 (1897). Where the president subscribes for the untaken original capital stock, and for two years none of the stockholders object, it is legal. *Shellenberger v. Patterson*, 168 Pa. St. 30 (1895). Where the directors sell unissued stock at a discount to

a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. *Keeney v. Converse*, 99 Mich. 316 (1894). Where the stockholders are present and only one objects to the issue of unissued stock to a director, whereby he acquires control, such issue is legal. *Christopher v. Noxon*, 4 Ont. Rep. (Can.) 672 (1883). In *Re London, etc., Ltd.*, 77 L. T. Rep. 146 (1897), there were one hundred and twenty founders' shares of £10 each, and twelve thousand ordinary shares of £10 each. The founders' shares were entitled to half of any dividend which might remain after paying ten per cent on the ordinary shares. The directors allotted to themselves eighty of these founders' shares, and the court upheld the allotment. The prospectus stated that each person taking fifty ordinary shares would be entitled to take one of the founders' shares. The directors caused the fifty ordinary shares for each of the eighty founders' shares to be taken by others.

² Where two companies are consolidated and their stockholders are to receive new stock in exchange for old stock, such new stock to be of four different kinds, with preferences, any increase of capital stock of the consolidated company must be offered proportionately to all the stockholders making the exchange, irrespective of their preference. *Jones v. Concord, etc. R. R.*, 38 Atl. Rep. 120 (N. H., 1892).

³ *Jones v. Concord, etc. R. R.*, 30 Atl. Rep. 614 (N. H., 1892).

subscription for new stock, to pay more than par value therefor. They are entitled to it without extra burden or price beyond the regular par value.¹ An attempt to deprive the stockholder of this right will be enjoined in the absence of laches or acquiescence.² The courts go very far in protecting the right of stockholders to subscribe for new stock. It is often a very important right.

A mere verbal notice by the stockholder to the corporation

¹ *Cunningham's Appeal*, 108 Pa. St. 546 (1885); *Jones v. Concord, etc. R. R.*, 30 Atl. Rep. 614 (N. H., 1892). Where the corporation in issuing new stock requires the old stockholders to pay a bonus in order to subscribe, a former stockholder may pay the bonus in order to get the stock, and may then recover back the bonus by a suit. *Dawson v. Insurance Co.*, 5 R'y & Corp. L. J. 154 (1888, Com. Pl. Phil.). If, on offering increased capital stock to the old stockholders, the company requires more than par, a stockholder who pays it, even under protest, cannot recover it back. He should have tendered par and then sued for refusal of the corporation to accept it. *De La Cuesta v. Insurance Co. of North Am.*, 136 Pa. St. 62, 658 (1890). Where by its charter a terminal and union depot company is obliged to allow new roads to demand and pay for a proportional part of the former company's capital stock, the price is par even though it is worth more. *St. Paul, etc. Co. v. Minnesota, etc. R. R.*, 47 Minn. 154 (1891). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock.

The court refused to compel the corporation to issue a certificate. *Baltimore, etc. R'y v. Hambleton*, 77 Md. 341 (1893).

² A stockholder's remedy, it is said, in such a case is clearly against the corporation, and he is not obliged to sue at law for damages. "The effect of such an action [*i. e.*, the action for damages] would be to convert part of his interest as a shareholder into a judgment for damages; in other words, to sell a portion of his stock to the corporation. . . . The judgment, to be effectual, must be against the corporation itself, not against the directors personally, who may be changed from time to time." *Dousman v. Wisconsin, etc. Co.*, 40 Wis. 418 (1876). In this case it is also held that the shareholder, where the stock is not yet fully issued, may have a decree in a court of equity restraining the whole issue, or else that there be an equitable distribution; and, if the shares are already partially distributed, that the proper amount be issued to the party complainant. *Cf. Eidman v. Bowman*, 58 Ill. 444 (1871). In Massachusetts, however, this is not the rule, and in that state it is held that the courts have no power to compel the corporation or the directors to issue the shares to the party aggrieved, if the whole capital stock is already out. *Sewall v. Eastern R. R.*, 63 Mass. 5 (1851). But an action will lie against the corporation for damages. *Gray v. Portland Bank*, 3 Mass. 364 (1807).

that he will take his proportion of the new issue under an increase is held in Louisiana not to be sufficient to render the company liable in damages for selling the shares to some one else.¹ The corporation may, however, and usually does, limit the time within which the shareholders may signify their intention to take up the new shares, and may require a part payment upon the shares within that time.² The stockholder, therefore, who brings his action against the corporation for damages for refusal to allow him to subscribe for the new shares, or for selling the shares to some one else, or for depriving him in any other way of them, must allege and prove that he demanded the shares and offered to subscribe and pay for them in the regular way, within the time fixed for such subscriptions.³ When the newly-issued shares have all been distributed or sold to others, in violation of a shareholder's preemptive right, his remedy is an action at law against the corporation for damages. And the measure of damages has been declared to be the excess of the market value above the par value at the time of the issue of the shares, with legal interest on such excess.⁴ The remedy of a stockholder for refusal of the corporation to allow him to subscribe for his portion of increased capital is at law alone, if the corporation is responsible.⁵ Other shareholders similarly aggrieved are not to be joined as parties plaintiff. Each stockholder sues alone, inasmuch as the

¹ *Hart v. St. Charles St. R. R.*, 30 La. Ann. 758 (1878), holding also that a tender must be made.

² *Sewall v. Eastern R. R.*, 63 Mass. 5 (1851); *Hart v. St. Charles St. R. R.*, 30 La. Ann. 758 (1878).

³ *Wilson v. Bank of Montgomery*, 29 Pa. St. 537 (1857). Although ten days are given to the subscribers to subscribe to the new stock, yet the representatives of a stockholder who was dead at the time of the issue, and to whose address no notice was sent, may claim their proportion of the stock which the corporation has not yet disposed of, although they applied about a year after the ten days elapsed, they not having heard of the matter until that time. *James v.*

Buena Ventura, etc. Syndicate, [1896] 1 Ch. 456.

⁴ *Eidman v. Bowman*, 58 Ill. 444 (1871); *Reese v. Bank of Montgomery*, 31 Pa. St. 78 (1855); *Gray v. Portland Bank*, 3 Mass. 364 (1807). The remedy for failure to allow the old stockholders to subscribe is not by a subsequent board of directors canceling the subscription, nor in equity to cancel the subscription made by others, nor to compel an issue to the old stockholders, but is at law for damages, and it must be alleged that plaintiffs offered or were willing to take the stock at par, or that it would have sold for more. *Shellenberger v. Patterson*, 168 Pa. St. 30 (1895).

⁵ *Meredith v. New Jersey, etc. Co.*, 37 Atl. Rep. 539 (N. J., 1897).

liability of the corporation in these cases is several and not joint.¹

§ 287. *Issue of new stock by a stock dividend.*—A frequent method of issuing an increase of the capital stock is by a stock dividend. In England there is some doubt as to whether such dividends may be imposed upon stockholders who object thereto, and demand the money dividend in lieu of which the stock is issued.² In this country such dividends are legal unless prohibited by constitutional or statutory provisions.³ But in all cases of a stock dividend, as a method of issuing an increase of the capital stock, there must be in the possession of the corporation an amount of property over and above its corporate debts equal to the whole capital stock, including the increase; and this amount cannot afterwards be used for any kind of a dividend.

§ 288. *Liability of the shareholder upon an increase of the capital stock—Irregularities in increasing the stock.*—A person subscribing for shares of stock upon an increase of the capital stock is liable thereon the same as a subscriber to the original capital stock. In some respects he cannot set up defenses that an original subscriber might have set up. Thus, a subscriber for increased stock cannot defeat an action to en-

¹ *Dousman v. Wisconsin, etc. Co.*, 40 Wis. 418 (1876). In an early Indiana decision it is said to be the law that where, in the charter, directors are given full power to effect an increase of the capital stock, "on such terms and conditions and in such manner as to them shall seem best," they may authorize the increase without the consent of the shareholders; that as to such increase there is no pre-emptive right, and that, accordingly, the newly-issued shares may be disposed of as the directors determine. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294 (1860). So, also, in New York it is said that the executory purchaser of shares of the original stock is not entitled to the proportionate amount of new stock on an increase of the capital. *Miller v. Illinois Cent. R. R.*, 24 Barb. 312 (1857). An incorporator

is not entitled to the increased stock as a gratuity; he must pay for it. *Brown v. Florida Southern R'y*, 19 Fla. 472 (1882).

² See ch. XXXII, *infra*.

³ See ch. XXXII, *infra*; also § 51, *supra*; *Howell v. Chicago, etc. R'y*, 51 Barb. 378 (1868). An increase of the capital stock, by the issue of new shares and the sale of them for less than their par value, is not such an "issue of fictitious stock" as the California state constitution forbids (art. XII, § 11). *Stein v. Howard*, 65 Cal. 616 (1884). Where the company is under obligations to issue stock to represent interest on subscriptions until dividends are declared, a stock dividend does not stop the interest. *Hardin County v. Louisville, etc. R. R.*, 92 Ky. 412 (1891).

force his subscription by setting up the failure of the corporation to obtain subscriptions for the whole of the authorized increase.¹ In general, a subscriber to an increase of stock cannot interpose defenses to his subscription which subscribers to the original stock could not have raised — such, for example, as technical objections to the validity of his contract of subscription.² Nor can the subscriber set up that the increase was irregularly effected. It is for the state alone to raise the question whether corporate capital stock has been lawfully and regularly increased.³ Especially it is the rule that, as against

¹ *Clarke v. Thomas*, 34 Ohio St. 40 (1877); *Nutter v. Lexington*, etc. R. R., 72 Mass. 85 (1856); *Delano v. Butler*, 118 U. S. 634 (1886); *Aspinwall v. Butler*, 133 U. S. 595 (1890); *Avegno v. Citizens' Bank*, 40 La. Ann. 799 (1889); *Pacific Nat. Bank v. Eaton*, 141 U. S. 227 (1891), rev'g *Eaton v. Pacific Nat. Bank*, 144 Mass. 260 (1887). A stockholder in a national bank cannot recover back a payment which he has made on increased capital stock, on the theory that the increase was irregularly made. The certificate of the comptroller fixing the increase is conclusive as to the regularity of all proceedings. *Columbia Nat. Bank v. Matthews*, 85 Fed. Rep. 934 (1898), rev'g *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 559, and 77 Fed. Rep. 372. To same effect, *Tillinghast v. Bailey*, 86 Fed. Rep. 46 (1897). A proxy authorizing the holder to vote "in the same manner as I should do were I there personally present," estops the stockholder giving the proxy from questioning the call of the meeting or the regularity of an increase of stock voted for at such meeting. *Columbia Nat. Bank v. Matthews*, 85 Fed. Rep. 934 (1898). Where the increased capital stock is not all subscribed for, and hence not effective, a subscriber who has paid for a part thereof may recover back the money; he may also recover back an assessment which the comptroller levied on such stock

and which he paid. *Brown v. Tillinghast*, 84 Fed. Rep. 71 (1897). Where some of the stock is void, a subscriber for both kinds, who has paid in part, cannot have the payments applied altogether on the valid stock. *Kampmann v. Tarver*, 29 S. W. Rep. 1144 (Tex., 1895). Where the increase is to be \$200,000, but the comptroller will allow but \$150,000, and, before anything is done, the bank becomes insolvent, a person who has partially paid for some of the proposed increase may recover the money back. *McFarlin v. First Nat. Bank*, 68 Fed. Rep. 868 (1895).

² *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126 (1874).

³ *Pullman v. Upton*, 96 U. S. 328 (1877). A party purchasing a certificate of stock not under seal nor signed by the president must take notice, and cannot afterwards complain that it was an irregular increase of stock. *Byers v. Rollins*, 13 Colo. 22 (1889). Stockholder participating in irregular increase of stock cannot afterwards object to it. *Poole v. West Point*, etc. Assoc., 30 Fed. Rep. 513 (1887). Irregularities in the increase of the capital stock will be disregarded as between the stockholders who participate. *Bailey v. Champlain*, etc. Co., 77 Wis. 453 (1890); *Bard v. Banigan*, 39 Fed. Rep. 13 (1889); aff'd, *Banigan v. Bard*, 134 U. S. 291.

corporate creditors, stockholders who have subscribed for the increased stock, accepted the certificate, and received dividends thereon, are estopped from defeating an action on their subscription by setting up that the stock was increased in an irregular or unlawful manner.¹ Subscribers to increased capital

¹ *Chubb v. Upton*, 95 U. S. 665 (1877); *Re Miller's Dale, etc. Co.*, L. R. 31 Ch. D. 211 (1885), in which a subscriber to new shares was not permitted to plead, as against creditors, that the issue was irregular because only thirteen days had elapsed between the passing of the resolution to increase the capital and the confirming of it, when the law required fourteen days; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464 (1873); and see *McCarthy v. Lavasche*, 89 Ill. 270 (1878); *Veeder v. Mudgett*, 95 N. Y. 295 (1884)—the last case holding that a statute allowing increase to be made by stockholders in meeting assembled on a specified notice is invalid if the notice did not conform to the statute, but that the stockholders are liable nevertheless to corporate creditors on such stock. *Sewell's Case*, L. R. 3 Ch. App. 131 (1868); *Upton v. Jackson*, 1 Flip. 413 (1874); S. C., 28 Fed. Cas. 844; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126 (1874). In such a case the state alone can properly raise the question whether the corporate stock had been regularly and lawfully increased. *Pullman v. Upton*, 96 U. S. 329 (1877). See *Clarke v. Thomas*, 34 Ohio St. 46 (1877); *Re Reciprocity Bank*, 22 N. Y. 9 (1860). See also *Peckham v. Smith*, 9 How. Pr. 436 (1854). Increased capital stock is legal, although it was issued to a person who was treasurer of a city and paid for the stock out of the city funds, the corporation not knowing thereof. *Olson v. State Bank*, 69 N. W. Rep. 904 (Minn., 1897). One who has accepted increased stock of a corporation, and has taken the office of president of such corporation by vir-

tue alone of such stock, is estopped to question its validity on the ground of the non-payment of a tax required to be paid by the corporation on increasing its stock. *Peck v. Elliott*, 79 Fed. Rep. 10 (1897). Where, upon the increase of the capital stock, \$3,000 of stock is issued to a party for a patent-right, and in about six months the patent-right is assigned back to him for \$1, he will be held liable for the \$3,000 in case the corporation becomes insolvent. *Peck v. Elliott*, 79 Fed. Rep. 10 (1897). A holder of increased capital stock of a national bank cannot defeat the statutory liability on the ground that the increase was irregularly made and was fraudulently made, in that the directors issued it to themselves without paying therefor. *Latimer v. Bard*, 76 Fed. Rep. 536 (1896). Even after the corporation has passed into the hands of a receiver, a subscriber for stock may rescind and sue for money paid, fraudulent representations having been made as to the condition of the company, the subscription being for increased stock, and the increase not having been made until sometime after the subscription. *Newbegin v. Newton Nat. Bank*, 66 Fed. Rep. 701 (1895); *aff'd*, *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135 (1896). In *Farmers' L. & T. Co. v. Forest Park, etc. R. R.*, 65 Fed. Rep. 882 (1895), a mortgagee, who had not been made a party defendant in the foreclosure of mechanics' liens, attempted to foreclose its mortgage and claim that the mechanics-lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued, because it

stock cannot escape liability therefor by setting up that the notice of increase was not published as required by statute.¹

But a contrary rule prevails as regards essential steps in the increase.² If there is no vote of the stockholders as required

exceeded the amount of the capital stock in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators, who long afterwards bought the bonds with knowledge of the facts, bought them for a small sum in order to bring this suit. The suit failed. It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co. v. Toledo, etc. R'y*, 67 Fed. Rep. 49 (1895). This same principle has arisen in many municipal-bond cases, holding that, although the bonds are not issued in conformity with the statute, yet, if the municipality had the benefit of the money, it is bound. See also the principles and cases in § 298, *infra*. The invalidity or irregularity of an increase of stock may be set up by the subscribers therefor as against creditors who were stockholders and managers of the company. *Sayles v. Brown*, 40 Fed. Rep. 8 (1889).

¹ *Handley v. Stutz*, 139 U. S. 417 (1891). Holders of increased capital stock cannot defeat their liability for the subscription price by alleging that the increase was made by a stockholders' meeting held out of

the state, or that proper notice of the meeting was not given, or that the required statutory publication of the increase was not made. *Stutz v. Handley*, 41 Fed. Rep. 531 (1890). If the stockholders have knowledge of the intention to increase the stock, the failure to give statutory notice cannot be taken advantage of by one not injured by such want of notice. *Columbia Nat. Bank's Appeal*, 16 W. N. Cas. 357; 42 Leg. Int. 226 (1885). Irregularity of notice of a meeting to increase the capital stock has been held to be fatal. *Re Wheeler*, 2 Abb. Pr. (N. S.) 361 (1866). If the statute requires a publication of notice of the intended increase, such publication must be made. As to the state, this publication cannot be waived, even by unanimous consent of the stockholders. The public are entitled to knowledge of the increase. *State v. McGrath*, 86 Mo. 239 (1885), the court refusing to grant a *mandamus* to compel the secretary of state to file the certificate. *Cf.* § 599, *infra*. Concerning the failure to give the requisite notice, see also chs. XXXVI and XLVI, *infra*. Where a person subscribes to the proposed increased capital stock, and the officers surreptitiously transfer some of their own old stock to him, he is not liable on the statutory liability thereon, even though he accepted the stock, being ignorant of the fraud practiced upon him. *Stephens v. Follett*, 43 Fed. Rep. 842 (1890). *Cf.* 75 N. W. Rep. 380.

² Where creditors' rights do not intervene, a subscriber for increased capital stock may defend against the subscription on the ground that the increase had not been made in accordance with the statutes, and may

by statute, they are not liable on the stock.¹ Stockholders of the original capital stock are of course not liable for the defaults of subscribers to the increased capital stock.²

do so even though he has paid part of the subscription and was one of the directors. Such subscriber may recover back such part of the money as he has paid, corporate creditors' rights not being prejudiced. In this case the company had not registered the increase of stock as required by statute. *Union R'y v. Sneed*, 41 S. W. Rep. 364 (Tenn., 1897). Where the charter provided that the capital stock may be increased after the existing capital stock is paid up, an increase before such payment is irregular, and a subscriber to an increase so made is not liable. *Page v. Austin*, 10 S. C. Rep. (Can.) 132 (1884). The annual meeting cannot vote an increase of the capital stock unless special notice of that business has been given, even though the by-laws provide that any business may be transacted at the annual meeting without special notice; the statute, however, prescribing that an increase of capital stock may be at "any meeting called for the purpose." *Jones v. Concord*, etc. R. R., 38 Atl. Rep. 120 (N. H., 1892).

¹ The receiver of a national bank cannot hold stockholders liable on increased stock where such increase was not authorized by a two-thirds vote of the stockholders. *Winters v. Armstrong*, 37 Fed. Rep. 508 (1889). In *American Tube Works v. Boston Machine Co.*, 139 Mass. 5 (1885), it was held that a creditor who had taken irregularly issued stock in payment of his debt might, over two years thereafter, and after the corporation became insolvent, repudiate the stock and again become a creditor. Where the president issues increased capital stock to himself and pays for it, it seems that upon the insolvency of the company he cannot rescind the

transaction on the ground that the increased stock had never been voted by the stockholders or authorized by the comptroller of the currency. *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893). A person who subscribes and pays for stock in a corporation may return the stock and recover back his subscription where such stock subscribed for by him was increased capital stock, but the increase was not made according to law. In this case the stockholders had voted the increase, but had not given thirty days' public notice, and had not filed a certificate with the secretary of state as required by statute. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729 (1893).

² *Veeder v. Mudgett*, 95 N. Y. 295 (1884). See also § 215, *supra*. A stockholder not participating is not liable for fraud in the increase of stock where the directors received pay therefor in notes which are worthless. So held under the Iowa statute. *Miller v. Bradish*, 69 Iowa, 278 (1886). See also *Delano v. Butler*, 118 U. S. 634 (1886). A statutory requirement that a certificate shall be filed when stock is fully paid does not render old stockholders liable for failure to file as to increased stock. *Sayles v. Brown*, 40 Fed. Rep. 8 (1889). A liability imposed until a specified certificate is filed is not revived by an increase of the capital stock. *Veeder v. Mudgett*, 95 N. Y. 295 (1884). See also *Ochiltree v. Railroad Co.*, 21 Wall. 249 (1874), as to liability on increase of capital stock. As to the liability on a reduction of the capital stock and the constitutionality thereof, see *Dane v. Young*, 61 Me. 160 (1872); also § 497, *infra*. In suing a stockholder on a statutory liability for failure to file a certificate upon

§ 289. *Rights and liabilities of the shareholders upon a reduction of the capital stock.*—Upon an authorized reduction of the capital stock of an incorporated company, regularly effected, the amount of corporate assets over and above the amount of the capital stock as reduced is equivalent to surplus profits, and may be treated as such by the corporation. It may be set aside as surplus, or it may be divided among the shareholders proportionally by a dividend, unless the rights of previous corporate creditors would thereby be injured.¹ Under certain cir-

an increase in the capital stock, only those who hold the increased capital stock are liable. *Griffith v. Green*, 129 N. Y. 517 (1892).

¹ *Strong v. Brooklyn Crosstown R. R.*, 93 N. Y. 426 (1883), where a corporation whose capital had been reduced one-half issued certificates of indebtedness bearing interest to shareholders for the excess. The application of a dissenting holder to have them declared illegal, and to restrain the corporation from paying them, was refused; *Seeley v. New York, etc. Bank*, 8 Daly, 400 (1878); *aff'd*, 78 N. Y. 608 (1879); *McCann v. First Nat. Bank*, 112 Ind. 354 (1887), approving of the text herein, and holding that where, by reason of bad debts, the capital stock is reduced, a subsequent collection of such debts does not sustain an action by a stockholder for his proportion thereof. If an increase of capital stock is afterwards canceled, a corporate creditor who was such previous to the increase cannot complain. *Coit v. Gold Amal. Co.*, 119 U. S. 343 (1886). A subscriber to the increased stock may recover back the money paid thereon if the corporation afterwards reduces the proposed increase, so that it shall correspond to the amount actually subscribed for. The principle laid down in §§ 176–181, *supra*, applies. *Eaton v. Pacific Nat. Bank*, 144 Mass. 260 (1887). *Cf.* § 288, *supra*. For the rules herein relative to life estates and remainders in stock, see § 559, *infra*.

A stockholder may enjoin the corporation from reducing its capital stock, as allowed by statute; calling in all certificates of stock; issuing new certificates proportionately; declaring a dividend of the surplus over the reduced capital stock, and, on account of the corporate property being invested, borrowing money to pay that dividend. *Coquard v. St. Louis, etc. Co.*, 7 S. W. Rep. 176 (Mo., 1888). Under the English statute a reduction of the capital stock reduces the preferred as well as the common stock. *Bannatyne v. Direct, etc. Co.*, L. R. 34 Ch. D. 287 (1886). And in general, see also *Re State Ins. Co.*, 14 Fed. Rep. 28 (1882); *Excelsior Petrol. Co. v. Lacey*, 63 N. Y. 422 (1875). A by-law cannot compel a stockholder to sell his stock to the corporation for the purpose of retiring it. *Bergman v. St. Paul, etc. Assoc.*, 29 Minn. 275 (1882). In England it is the rule that, when the assets are already reduced by losses, the corporation cannot effect a reduction of the capital stock so as to cover up the losses. *Re Ebbw Vale Steel, etc. Co.*, L. R. 4 Ch. D. 827 (1877). And yet it would seem that a greater injury would be worked upon the public by continuing business with an impaired capital than to reduce it openly to what it actually is. *Cf. Re Kirkstall Brewery Co.*, L. R. 5 Ch. D. 535 (1877). In England, by statute, a plan for reducing the capital stock must be presented to and approved

cumstances the surplus may be used to buy outstanding shares of stock.¹ But it is not the rule that the reduction of the capital stock of a corporation always authorizes the distribution among the stockholders of a sum equal to the difference between the original and the reduced amount of capital. Such a distribution is lawful only when it appears that the original capital stock was unimpaired at the time of the decrease. The corporation can divide among its stockholders only such a sum as will leave with the corporation an amount equal to the reduced capital stock.² Not only this, but corporate creditors who were such before the reduction may disregard the reduction and enforce payment of their debts from the original unpaid subscriptions, as though no reduction had taken place.³ Owners of claims not yet due may prevent a distribution of capital stock upon a reduction thereof, unless security is given.⁴ But creditors whose debts were contracted subsequently to the reduction can look only to the capital stock, as reduced, for security. They will be held to have given credit upon the faith of that amount of stock alone.⁵ Where preferred stock was to have five per cent and the common stock seven per cent, and the remaining profits were to go equally to the common stock and

by the courts. *Re Direct, etc. Co.*, L. R. 34 Ch. D. 307 (1886). And a distribution of part of the capital stock among the shareholders proportionally is an unauthorized reduction, and the stock so distributed will be ordered to be returned. *Holmes v. Newcastle Abattoir Co.*, 45 L. J. (Ch.) 383 (1875). Where the capital stock is reduced by reason of certain doubtful securities, the securities should not be withdrawn from the assets of the bank and put into a trust. *McCann v. First Nat. Bank*, 131 Ind. 95 (1892).

¹ See § 282, *supra*.

² *Strong v. Brooklyn Crosstown R. R.*, 93 N. Y. 426 (1883).

³ *Re State Ins. Co.*, 14 Fed. Rep. 28 (1882); *Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864). Shareholders have no power to avoid liability on their stock by reducing either the amount of it or the par value of the shares.

Dane v. Young, 61 Me. 160 (1872). *Cf. Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864). A subscriber for \$1,000 of stock who pays in \$200, being twenty per cent, and then transfers \$200 of full-paid stock to another, is still liable for the remaining \$800. It is immaterial that the old certificates, showing that twenty per cent had been paid, were returned to the corporation, and only \$200 of stock re-issued. This does not amount to a reduction of the stock to twenty per cent. *Putnam v. Hutchison*, 4 Can. App. 273 (1896).

⁴ *Re Telegraph Const. Co.*, L. R. 10 Eq. 384 (1870).

⁵ *Hepburn v. Exchange, etc. Co.*, 4 La. Ann. 87 (1849); *Palfrey v. Paulding*, 7 La. Ann. 303 (1852); *Cooper v. Frederick*, 9 Ala. 738, 742 (1846). *Cf. Re State Ins. Co.*, 15 Fed. Rep. 28 (1882).

to founders' shares, and a reduction of capital is made by reason of losses, the reduction may be made by canceling the founders' shares and part of the common stock.¹

A reduction of the capital stock is effected only when all statutory formalities have been complied with.² But corporate creditors who become such after a reduction of the capital stock has been made cannot claim that such reduction was irregularly made and that the holders of the canceled capital stock are consequently liable still.³

§ 290. *Change in the number or par value of the shares.*—It is a principle of law closely related to those already set forth in this chapter, and well settled, that the number of shares into which the capital stock has been divided, and the par value of those shares, can neither be increased nor diminished, in number or in value, without express warrant of authority either from the legislature or the charter of the company.⁴ When, however,

¹ *Re London, etc. Inv. Corporation*, [1895] 2 Ch. 860, the court saying that "where there are different classes of shares the loss on a reduction ought to fall on those who would have to bear it if there was a winding up." See also § 278, *supra*. Under the English statutes, where the capital stock consists of stock and deferred stock, the former being practically preferred stock and the latter common stock, a reduction of the whole capital stock may be effected, with the consent of the common stockholders, by canceling a part of the common stock and having the remainder become preferred stock (in other words, by wiping out all preferences), even though some of the preferred stockholders objected, there being originally no preferences as to assets. *Re Hyderabad Co.*, 75 L. T. Rep. 23 (1896).

² See *Moses v. Ocoee Bank*, 1 Lea (Tenn.), 398 (1878), holding that, where a corporation has power under its charter to reduce its capital stock, it must clearly appear that it has ordered the reduction to be made; neither equivocal acts nor inferences

nor unauthorized acts of a president or director will be sufficient; *Ferris v. Ludlow*, 7 Ind. 517 (1856), holding that where the records of a company showed that propositions to reduce its stock had been made, but failed to show any acceptance, there was no reduction. See also *Grangers', etc. Ins. Co. v. Kamper*, 73 Ala. 325 (1882).

³ *Gade v. Perkins*, 46 N. E. Rep. 286 (Ill., 1896).

⁴ *Salem Mill-dam Corp. v. Ropes*, 23 Mass. 23 (1827); *Re Financial Corporation (Holmes's Case)*, L. R. 2 Ch. App. 714, 733 (1867); *Droitwich Salt Co. v. Curzon*, L. R. 3 Exch. 35, 42 (1867); *Smith v. Goldsworthy*, 4 Q. B. 430 (1843). *Cf. Sewell's Case*, L. R. 3 Ch. App. 131 (1868). A corporation has no implied power to change the number or par value of its stock. The stock as so changed is void, and the holders are not liable thereon even to corporate creditors, and even though the money paid by them for the stock has been returned to them. *Tschumi v. Hills*, 51 Pac. Rep. 619 (Kan., 1897). "A corporation with a fixed capital, divided into a fixed number of shares, can have no power

the charter does not fix the number or amount of the shares, it devolves upon the shareholders or directors to fix them; and in such a case it seems that the limit established might lawfully be changed without special authority.¹

B. ILLEGAL INCREASE OF STOCK, BEING OVERISSUED STOCK.

§ 291. *Unauthorized increase of stock may amount to over-issued stock.*—Where the full capital stock of a corporation has been issued, and there is no statute or charter provision authorizing an increase of the stock, it is clear that any issue of stock in excess of the capital stock is not a legitimate increase of the capital stock. It is unauthorized and illegal, and is termed in law an overissue of stock. There is a clear distinction between overissued stock and an irregular increase of stock. The former is where an increase of the stock is made, although no increase is authorized by the charter or by statute. The latter occurs when there is a statutory or charter provision authorizing an increase of the stock, but the formalities prescribed for making that increase have not been strictly complied with. Overissued stock is void, while an irregular increase of stock is merely voidable.

The issue by a corporation of new certificates of stock in place of lost certificates does not constitute an overissue of stock.² An overissue of stock often arises by forgery on the

of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the state can alone confer that authority." It cannot be increased "by the covert or fraudulent efforts of one or more of the agents of the corporation." *New York, etc. R. R. v. Schuyler*, 34 N. Y. 30, 49 (1865). *Cf. Scovill v. Thayer*, 105 U. S. 143 (1881). Where all the shares are reduced in par value from \$50 to \$38, and the \$12 difference is paid to the stockholders in cash, this is a reduction of capital stock and not a dividend, and cannot be taxed as a dividend. *Commonwealth v. Central Transp. Co.*, 145 Pa. St. 89 (1891). A reduction of the par value

of the common stock and not of the preferred is not allowed in England. *Re Union, etc. Co.*, L. R. 42 Ch. D. 513 (1889).

¹*Somerset, etc. R. R. v. Cushing*, 45 Me. 524 (1858); *Ambergate, etc. R'y v. Mitchell*, 4 Exch. 540 (1849); *Re European Cent. R'y*, L. R. 8 Eq. 438 (1869). It has been held allowable, however, for the company to allow the holders of paid-up shares to return them and take in exchange shares of double the par value as half paid up, and *vice versa*, both kinds of stock being authorized. *Teasdale's Case*, L. R. 9 Ch. App. 54 (1873).

²*Kinnan v. Forty-second, etc. R. R.*, 21 N. Y. Supp. 789 (1893). See also §§ 368-370, *infra*.

part of an officer of the corporation who forges the necessary names of the corporate officers to the certificate and puts it in circulation.¹

§ 292. *Overissued stock is absolutely void.*—By overissued stock is to be understood stock issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represent overissued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the overissue is not material. Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void.² So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality. Over-issued or spurious stock may, however, it seems, be legalized by a subsequent legal increase of the capital stock.³

§ 293. *Liability of the corporation as to overissued stock — Who is a bona fide holder.*—Although it is settled law that overissued stock is void and valueless, and that no action lies either to compel the corporation to recognize the holder as a stockholder, or to issue in place thereof a valid certificate, yet where overissued certificates of stock, signed or purporting to be signed by the corporate officers having the authority to issue stock, and actually issued by such officers, are purchased by any person, or are taken in any manner in good faith and for

¹ See § 293, *infra*.

² The great and leading case on this subject is *New York, etc. R. R. v. Schuyler*, 34 N. Y. 30 (1865); *Hayden v. Charter Oak Driving Park*, 63 Conn. 142 (1893). *Cf. Mechanics' Bank v. New York, etc. R. R.*, 13 N. Y. 599 (1856). See also, as to the point that overissued stock is void even in the hands of *bona fide* holders, *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882); *Bruff v. Mali*, 36 N. Y. 200 (1867); *People v. Parker Vein Coal Co.*, 10 How. Pr. 543 (1854); *Sewell's Case*, L. R. 3 Ch. App. 131, 138 (1868);

Wright's Appeal, 99 Pa. St. 425 (1882); *Scovill v. Thayer*, 105 U. S. 143 (1881). See also § 281, *supra*.

³ *Sewell's Case*, L. R. 3 Ch. App. 131 (1868); *New York, etc. R. R. v. Schuyler*, 34 N. Y. 30, 56, 57 (1865). A reorganized company may be charged with notice of the reorganization agreement, and may be estopped from complaining that a part of the securities issued by the old corporation were overissues. *Davidson v. Mexican Nat. R. R.*, 11 N. Y. App. Div. 28 (1896).

value, such *bona fide* holder may sue the corporation in tort and recover damages.¹

There is, however, a very important limitation to this rule. It is well established that a person dealing with an officer of a corporation in a matter in which the officer is personally interested is not a *bona fide* holder of corporate securities received by him from the officer in that transaction. He is bound to inquire into the legality of any stock or corporate note which such officer issues or transfers to him, and is chargeable with notice of illegalities in the issue. This rule applies particularly to overissued or fraudulently-issued stock. A person receiving stock from a corporate officer as collateral security for a personal obligation of such officer, or purchasing stock from such officer, is bound to inquire into the legality of the issue. He is not a *bona fide* holder, and cannot hold the corporation liable on the ground that the stock was spurious.²

¹ New York, etc. *R. R. v. Schuyler*, 34 N. Y. 30, 49, 60 (1865); *Bruff v. Mali*, 36 N. Y. 200 (1867); *Titus v. Great Western Turnp.*, 5 Lans. 250 (1872); *S. C.*, 61 N. Y. 237 (1874); *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 180, 216 (1846). This was a suit in equity by a bank against another bank which, acting as its transfer agent, had made a large overissue of its stock. *Tome v. Parkersburg Branch R. R.*, 39 Md. 36 (1873); *Willis v. Philadelphia, etc. R. R.*, 6 W. N. Cas. 461 (1878); *Willis v. Fry*, 13 Phila. 33 (1879); *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882). See also *Daly v. Thompson*, 10 M. & W. 309 (1842); *Re Bahia, etc. R'y*, L. R. 3 Q. B. 584, 595 (1868); *Simm v. Anglo-Amer. Tel. Co.*, L. R. 5 Q. B. D. 188 (1879); *Waterhouse v. London, etc. R'y*, 41 L. T. Rep. 553 (1879); *Mandlebaum v. North Am. Min. Co.*, 4 Mich. 465 (1857); *Wright's Appeal*, 99 Pa. St. 425 (1882). In many of these cases the overissue was due to a mistake of the corporation in allowing a transfer of stock. The failure to surrender an old certificate does not give a purchaser of stock notice that an

overissue is being made. *Allen v. South Boston R. R.*, 150 Mass. 200 (1889). A party who purchases over-issued stock, but is not a purchaser in good faith for full value, cannot hold the company liable where the stock was issued by the executive committee without authority. *Ryder v. Bushwick R. R.*, 134 N. Y. 83 (1892). Where a party contracts to deliver notes for stock, and before the delivery of the notes the stock is sent to the corporation for transfer, and the corporation refuses to transfer the same on the ground that it was over-issued stock, the vendee has no recourse against the corporation if he delivers the notes to the vendor after receiving such information from the corporation. In this case the vendor was president of the corporation. *Hayden v. Charter Oak Driving Park*, 63 Conn. 142 (1893).

² *Farrington v. South Boston R. R.*, 150 Mass. 406 (1890); *Moores v. Citizens' Nat. Bank*, 111 U. S. 156 (1884); *Wilson v. Metropolitan El. R'y*, 120 N. Y. 145 (1890). See also §§ 727 and 766, *infra*. A person taking bonds from a corporation to secure a pri-

Where a certificate of stock is forged by persons other than the corporate officers, the corporation is of course not liable thereon unless it has recognized such certificate in some way. But where the forgery was by a corporate officer, or has been recognized in some way by the corporation, difficult questions arise. The law on the subject is somewhat unsettled, and at present each case seems to turn largely on the facts in that case. In Massachusetts the rule seems to be that the corporation is not liable if forgery enters into the transaction.¹ In

vate debt is bound to ascertain the right of the officer to so issue the bonds. *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896). A party taking from the president, as security for a loan to him personally, warehouse receipts issued by the corporation, is not a *bona fide* holder. *Bank of N. Y. etc. Assoc. v. American Dock, etc. Co.*, 143 N. Y. 559 (1894). *Cf. Hanover Nat. Bank v. American Dock Co.*, 75 Hun, 55 (1894). Where a corporate note is issued to a third person and then passes into the hands of an officer, the person taking it from the officer is not affected by the rule that a person taking corporate paper in its original issue by a corporation is bound to ascertain the facts if the officer is personally interested in the transaction. *Cheever v. Pittsburgh, etc. R. R.*, 150 N. Y. 59 (1896). In the federal courts a person taking from the president of a corporation a note signed by the corporation and indorsed by him is not bound to inquire into the consideration. *Doe v. Northwestern Coal, etc. Co.*, 78 Fed. Rep. 62 (1896). A principal taking bonds as collateral security to a note sent to him by his agent is not chargeable with notice of the fact that the agent, as the agent of a corporation, has fraudulently put the bonds into circulation. *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 56 Fed. Rep. 849 (1893). But overissued stock issued by the president to his private debtor,

in payment of his private debt, has been held not to confer on such debtor a right to hold the corporation responsible. *Wright's Appeal*, 99 Pa. St. 425 (1882). In this case the court assumes that the debtor could not be heard to claim *bona fides*. A person taking from the treasurer of a corporation its check in payment of the treasurer's personal debt must inquire whether the treasurer was authorized to use the money for that purpose. *Mt. Verd, etc. Co. v. McElwee*, 42 S. W. Rep. 465 (Tenn., 1897). A person taking a corporate note from an officer for a personal liability is protected, even though the issue of the note was not legal, if it turns out that the books showed that the company authorized the note and afterwards affirmed it. *St. Joe, etc. Co. v. First Nat. Bank*, 50 Pac. Rep. 1055 (Cal., 1897). Although the husband is in possession of a certificate of stock running to his wife and transferred in blank by her, yet he cannot deliver the same in payment of his personal debt. The purchaser is not a *bona fide* purchaser. *Wilson v. Wilson-Rogers*, 37 Atl. Rep. 117 (Pa., 1897). *Contra*, 40 Atl. Rep. 992.

On this subject of notice, see also §§ 716, 727, 766, *infra*; 86 Fed. Rep. 742.

¹ Where the signatures of the president and treasurer to certificates are required, and the president issues fraudulent certificates to himself and forges the treasurer's name thereto, the corporation is not liable therefor,

England a contrary rule seems to prevail.¹ In New York the latest decision is to the effect that the corporation is not liable.² But where the treasurer is the proper agent to issue stock, and the president entrusts him with certificates signed in blank, the corporation is liable for overissued stock issued and sold by

even to *bona fide* purchasers. *Hill v. Jewett* Pub. Co., 154 Mass. 172 (1891).

¹ *Shaw v. Port Philip, etc. Min. Co.*, L. R. 13 Q. B. D. 103 (1884), where the corporation was held liable on a certificate signed and issued by the secretary of the corporation, but who had forged thereto the names of the other corporate officers whose signatures were necessary to the issue of a certificate of stock. *Cf. Duncan v. Luntley*, 2 Macn. & G. 30 (1849).

² Where a person, who formerly was a transfer agent, but has since ceased to be, takes a certificate of stock which had been signed by the former president of the company without any name being filled into the certificate, and forges the name of the former treasurer to the certificate, and fills in his own name as the stockholder, the paper is a forgery as to all of the officers, and does not render the corporation liable thereon. The fact that the party committing the forgery was the president at the time he transferred the stock does not bind the corporation. In issuing the stock he was not apparently acting within the scope of his authority. Representations by him that the stock was good do not bind the company, the stock having been negotiated by him in business other than the business of the corporation. The stock was negotiated in a personal transaction of the officer. *Manhattan L. Ins. Co. v. Forty-second, etc. R. R.*, 139 N. Y. 146 (1893). But where the secretary and treasurer of a corporation, who is also its agent for the transfer of stock, and authorized to countersign and issue stock when signed by the president, forges the

name of the latter and fraudulently issues a certificate of stock, the corporation is liable to a bank which has accepted such certificate in good faith as security for a loan. In this case the bank caused inquiry to be made at the office of the railroad company, and was informed by the secretary and treasurer that the certificate was genuine. The bank was allowed to recover, although it had sold the forged stock, but had taken it back upon the forgery becoming known. *Fifth Avenue Bank v. Forty-second Street, etc. R. R.*, 137 N. Y. 231 (1893). Where certificates of stock are to be signed by the transfer agent and secretary, and the president and treasurer, if the president signs the certificates in blank and delivers them to the secretary and transfer agent, and the latter forges the name of the treasurer to the certificate and issues the certificate, a person who loans money on the faith of such certificate, after inquiring of the company whether the certificate is genuine, and being informed by the secretary that it is genuine, may hold the company liable in damages for refusal to transfer the stock. A second pledgee who inquires of the first pledgee in regard to the validity of the certificate, and is given the information which the first pledgee obtained from the corporation, may also hold the company liable, the second pledgee having taken up the loan of the first pledgee. *Mutual L. Ins. Co. v. Forty-second, etc. R. R.*, 74 Hun, 505 (1893).

On this subject, see also §§ 294, 363, *infra*.

the treasurer for his own benefit, even though no old certificate was surrendered.¹

In Ohio, moreover, the court holds that where the president signs a large number of the blank certificates of stock, and the

¹ *Allen v. South Boston R. R.*, 150 Mass. 200 (1889). See also *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 484 (1886), where the corporate officers issued stock, not in excess of the capital stock, but a part of the unissued original capital stock. They issued it for their own benefit. Where an officer of a corporation fraudulently issued stock for his own use, controlled all the books relating to the stock, and countersigned all the certificates, the corporation was held liable for the spurious stock. *Tome v. Parkersburg Branch R. R.*, 39 Md. 36 (1873). So also where overissued stock is issued under the genuine seal of the corporation, the corporation is liable. *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882). Where the secretary of the company has made fraudulent transfers of stock and falsified the share register, and fraudulently induced two of the directors to affix the seal of the company to the certificates, the company is liable to a purchaser of the certificates. The measure of damages is the price paid by the purchaser for the certificate, with interest thereon, the application for transfer having been made to the company on that same day. *Re Ottos*, etc. Mines, [1893] 1 Ch. 618. In the case of *Swain v. West Philadelphia Pass. R'y* (see 127 Pa. St. 616), the supreme court of Pennsylvania held a corporation liable for a fraudulent, false, spurious, and void issue of stock by its president. "The liability of the railway company arises on the principle of estoppel which the necessities of trade and commerce require. Stock certificates issued by a corporation having power to issue are a continuing affirmation of the owner-

ship of the special amount of stock by the person designated therein, or his assignee, and the purchaser has a right to rely thereon and claim the benefit of an estoppel in his favor as against the corporation." See also *Jeanes's Appeal*, 116 Pa. St. 573 (1887); *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513 (1882). Where a transfer clerk of a corporation makes out a spurious and overissued certificate of stock in the name of a fictitious person, and causes the genuine signatures of the president, assistant treasurer, and registrar to be signed thereto by them, and then indorses under the blank form of transfer on the back thereof the name of the fictitious person, and attests the same himself as a witness, and then delivers the same to a broker to sell on account of such transfer clerk, and the broker, before selling, inquires of the registrar of transfers, and also of the company itself, as to whether the stock is genuine and acceptable for transfer, and is told that it is all right, such broker is protected under his sale of the stock; and where the broker sells the stock, and by the rules of the stock exchange is thereafter obliged to take it back, he may hold the corporation liable. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652 (1896). In *Knox v. Eden Musée Co.*, 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The

secretary fraudulently fills in the blanks, including his own name as the owner of the stock, and signs the certificates as secretary, and attaches the corporate seal, and negotiates them by indorsing them, the corporation is liable to the *bona fide* purchaser of said stock from the secretary, although the stock is overissued and spurious.¹ This is on the general principle of law that a corporation, like a natural person, is liable in damages for the torts and frauds of its agents when acting within the scope of their proper employment; and when fraudulent certificates are issued by its officers, and pass innocently into the hands of *bona fide* holders for value, the corporation is estopped to deny the authority of such agents, and cannot escape liability for damages so resulting.

If an innocent holder of overissued stock brings an action in equity to compel the corporation to record the transfer, he will be denied that relief, but may have, in lieu thereof, damages at law.² The better remedy in such a case is an action at law, and the measure of damages is the market value of the stock at the time the transfer was demanded.³

§ 294. *Defenses of the corporation to such actions.*—It frequently happens that an overissue of stock is made without a strict compliance with the formalities of an issue of genuine stock. Generally, certificates of stock must, according to the

court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock. This case came before the court again in 17 N. Y. App. Div. 365 (1897). Where the corporation is held liable, it of course has recourse against the officer guilty of the fraud. *Brooklyn Crosstown R. R. v. Strong*, 75 N. Y. 591 (1878). Where stock is treated as canceled by all parties, including the holder, a subsequent transferee of the certificates from him cannot hold the company liable, unless the transferee is a holder in good faith for value. *Miller v. Houston, etc. St. R'y*, 69 Fed. Rep. 63 (1895). The liability of the corporation to a *bona fide* holder of overissued stock cannot be avoided

by a receiver purchasing and canceling an equal amount of valid stock. *Archer v. Dunham*, 89 Hun, 387 (1895).

¹ *Cincinnati, etc. R'y v. Citizens' Nat. Bank*, 47 N. E. Rep. 249 (Ohio, 1897).

² *Willis v. Philadelphia, etc. R. R.*, 6 W. N. Cas. 461 (1878); *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882).

³ *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882); *Willis v. Philadelphia, etc. R. R.*, 6 W. N. Cas. 461 (1878); *Tome v. Parkersburg Branch R. R.*, 39 Md. 36 (1873). It is, however, a condition precedent to maintaining such an action that the holder of the overissued stock discharge any lien upon it which would have properly attached to genuine stock under the same conditions. *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513 (1882).

by-laws of the corporation, be signed by certain specified corporate officers. Often, however, nothing in the charter or by-laws of the corporation regulates the form or contents of a certificate of stock. Accordingly, when action is brought against a corporation on overissued stock, the defense is sometimes set up that the certificates were not signed by the proper officers, or were not issued with the usual formalities, and consequently that, the purchaser having had notice of the infirmity, the corporation is not liable. But such a defense is not favored by the courts.¹ Where, however, the charter provided that certificates of stock should be signed by the president, directors, and treasurer, fraudulent overissues signed by the president and treasurer alone were held not sufficient to charge the corporation.²

§ 295. *Personal liability of the officers of the corporation on overissued stock.*—The officers of a corporation who are authorized to issue certificates of stock to the stockholders are liable in tort, both to the immediate purchasers from them of spurious stock falsely and fraudulently certified by them, and also to any subsequent purchaser buying upon the faith of the false certificate, and sustaining damage thereby.³ There may be a joint action against the corporation and the corporate agents issuing the stock, or a separate action against either.⁴

¹ See § 293, *supra*.

² *Holbrook v. Fauquier*, etc. Turnp. Co., 3 Cranch, C. C. 425 (1829); S. C., 12 Fed. Cas. 322. See also cases in notes to § 293, *supra*.

³ *Bruff v. Mali*, 36 N. Y. 200 (1867); *Seizer v. Mali*, 41 N. Y. 619 (1869), reversing S. C., 32 Barb. 76 (1860); 11 Abb. Pr. 129; *Cazeaux v. Mali*, 25 Barb. 578 (1857). And the holder of genuine stock has an action against them for the depreciation of its value by reason of the overissue. *Shotwell v. Mali*, 38 Barb. 445 (1862). A person receiving stock from the directors of a corporation, in pledge for a loan to it, they knowing that the stock was overissued, may sue the directors for damages in an action for deceit. *Whitehaven, etc. Co. v. Reed*, 54 L. T. Rep. 360 (1886); *National Exch. Bank*

v. Sibley, 71 Ga. 726 (1883). See also *Daly v. Thompson*, 10 M. & W. 309 (1842). By statute in many of the states and in England such forgeries are made a special criminal offense. *Regina v. Nash*, 2 Den. Cr. C. 493 (1852); N. Y. Pen. Code, § 591. Concerning the requirements of an indictment for issuing fraudulent stock, see *West v. People*, 137 Ill. 189 (1891). A criminal statute against fraudulently issuing stock does not apply to a transaction where the treasurer obtained a certificate which he as an individual had pledged, and after obtaining it canceled it as treasurer and issued a new certificate to himself in place thereof. *State v. Moore*, 39 Atl. Rep. 584 (N. H., 1897).

⁴ *Bruff v. Mali*, 36 N. Y. 200 (1867).

A corporation may sue in assumpsit its treasurer, who has illegally issued excessive stock and converted the proceeds to his own use.¹

§ 296. *Liability of the vendor of overissued stock.*—In the absence of fraud the purchaser of overissued and spurious stock cannot hold his vendor liable thereon. The *bona fide* vendor can be held to warrant only his own title to the shares, not the right of the corporation to issue them. If he came by them honestly and sells them in good faith, there is no recourse to him, even though they turn out to be spurious.² The supreme court of the United States holds, however, that a purchaser without notice of a forged bond may recover back the price paid by him to the vendor, even though the vendor was himself a *bona fide* purchaser and without notice of the illegality of the bond. There is an implied warranty of identity of the thing sold.³ A broker is not responsible where he in good faith loans his customers money in compliance with his authority, on certificates of stock as collateral, even though they turn out to be forged, provided he was not guilty of negligence.⁴

And when the action is against the officers responsible for the fraudulent overissue, if the evidence shows that the entire capital stock of the company had been issued prior to the dates of the certificates purchased or held by the plaintiff, and if it appears that the defendants prior thereto had, as officers of the corporation, issued spurious certificates of stock, then there is a presumption of law that the certificates in controversy are false and fraudulent, and the burden is upon the defendants to show that these particular certificates were issued, either upon the surrender of certificates of genuine stock, or upon the transfer on the books of the company of such stock—facts peculiarly within the knowledge of the corporate officers. *Shotwell v. Mali*, 38 Barb. 445, 469 (1862), a well-considered case; *Bruff v. Mali*, 36 N. Y. 200 (1867).

¹ *Rutland R. R. v. Haven*, 62 Vt. 39

(1889). See also *Brooklyn Crosstown R. R. v. Strong*, 75 N. Y. 591 (1878).

² *State v. North Louisiana, etc. R. R.*, 34 La. Ann. 947 (1882); *People's Bank v. Kurtz*, 99 Pa. St. 344 (1882); *Seizer v. Mali*, 41 N. Y. 619 (1869), reversing 32 Barb. 76 (1860). A sale of bonds is not revocable even though invalid and the vendor innocently stated that they were valid. *Ruohs v. Third Nat. Bank*, 94 Tenn. 57 (1894). In *Titus v. Poole*, 73 Hun, 383 (1893), there is a dictum that the vendor of a certificate of stock impliedly warrants the genuineness thereof.

³ *Meyer v. Richards*, 163 U. S. 385 (1896).

⁴ The question of negligence is a question for the jury, and the burden of proof is on the broker. The broker is not bound to present the certificates to the company for verification. *Isham v. Post*, 141 N. Y. 100 (1894). As to the liability of brokers for the forgery of their employees in

§ 297. *Equity will enjoin voting, transferring, or dividends on such stock, and will adjust the rights of all parties.*—A court of equity will, upon a proper application, grant an injunction to prevent the transfer of illegally-issued stock, or the payment of dividends thereon, or the voting of the pretended owners of such stocks.¹ The most effectual remedy in these cases is a suit in equity, instituted by the corporation, whereby, in one proceeding, the rights and liabilities of all persons concerned with the overissue of the stock are fully and finally determined and adjudicated, and the overissued stock itself is retired and destroyed. Such a proceeding is in the nature of a bill to quiet title, or to remove a cloud from the title of the genuine stock. Spurious or overissued stock, issued by corporate officers having the apparent authority, and outstanding in the hands of numerous holders, is a cloud upon the title to the genuine stock. It is a cloud which a court of equity will remove; and a suit to that end may be commenced, either by the corporation² or by the stockholders themselves in their own behalf, where the corporation fails or refuses to institute it.³ Were it not for this rem-

delivering spurious stock to a customer, see *Andrews v. Clark*, 72 Md. 396 (1890). In *Isham v. Post*, 71 Hun, 184 (1893), a broker was held liable to his customer for whom he had purchased certificates of stock which turned out to be forgeries. Compare, however, § 364, *infra*. See also ch. XXV, *infra*.

¹ *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159 (1879). And where a corporate officer issues illegal and unauthorized stock, he may be enjoined from allowing a transfer of it if proof is given of its illegal character and of a proposed transfer. *Sherman v. Clark*, 4 Nev. 138 (1869).

² *New York, etc. R. R. v. Schuyler*, 17 N. Y. 592 (1858). Stock purchased from the secretary, as secretary, is not good if overissued, and if the secretary sold it for his own benefit, even though it was duly signed. A bill in equity lies to cancel it. *Cincinnati, etc. R'y v. Citizens' Nat. Bank*, 3 R'y & Corp. L. J. 459 (Cincinnati

Super. Ct., 1888). A suit to determine what stock is watered (alleged to be overissued stock), and also to set aside transactions by which the corporate property has been misapplied, is multifarious. *Church v. Citizens' Street R. R.*, 78 Fed. Rep. 526 (1897). Where stock can only be issued on the consent of railroad commissioners, and then only to the extent of the value of the property, and such commissioners revoke a consent already given, an injunction lies at the instance of the corporation against any transfer of the stock, it appearing also that the stock had not been registered with the secretary of state, as required by statute. *Davis v. San Antonio, etc. R'y*, 44 S. W. Rep. 1012 (Tex., 1898).

³ Quoted and approved in *Hutton v. Bancroft, etc. Co.*, 83 Fed. Rep. 17 (1897); *Dewing v. Perdicaries*, 96 U. S. 193 (1877); *Wood v. Union, etc. Assoc.*, 63 Wis. 9 (1885); *Perdicaris v. Charleston Gaslight Co.*, Chase's Dec. 435

edy in equity, a corporation whose officers have fraudulently issued a spurious stock would soon be thrown into insolvency and a receivership by reason of the multitudinous suits at law which would be brought, attended, as such suits are, by attachments and heavy bills of costs. In order to protect, preserve, and administer the corporate assets in such cases, and in order to prevent a multiplicity of suits and remove a cloud from the title to the other stock, a court of equity will assume jurisdiction.

§ 298. *Subscriber's right to defeat a subscription to overissued stock, and to recover back money paid thereon.*—In addition to the remedy in equity, the holder of overissued stock has the further right at law to defeat an action on his subscription therefor; and that, too, even though he knew it to be overissued at the time the subscription was made. There can be no estoppel in such a case; and not even creditors can enforce any liability on spurious or overissued stocks.¹ Where also a subscriber has paid an instalment on his subscription, although he knew when he made the subscription and paid the money that it was an illegal and unauthorized issue, he may rescind, and recover back what he has paid.² In Iowa it has been held that payment of a note given for overissued stock cannot be enforced where the consideration was expressed in the note to be

(1869). *Cf. Taylor v. South, etc. R. R.*, 4 Woods, 575 (1882), where the subscriber acquiesced ten years. The court denied any relief. In an action to cancel illegally increased stock the plaintiff must offer to surrender the part held by himself. *Byers v. Rollins*, 13 Colo. 23 (1889).

¹ *Scovill v. Thayer*, 105 U. S. 143 (1881); *Page v. Austin*, 10 Can. Sup. Ct. 132 (1884); *Clark v. Turner*, 73 Ga. 1 (1884). Although a corporation has taken more subscriptions than its capital stock and has issued certificates therefor, yet this does not release subscribers up to the correct amount. *Cartwright v. Dickinson*, 88 Tenn. 476 (1890). The holders of stock cannot escape the statutory liability thereon, even though when the transfer of the stock to them was

made the old certificates were not canceled, but were abstracted by a corporate officer and hypothecated by him, thereby creating an over-issue. *Burt v. Bailey*, 73 Fed. Rep. 693 (1896). See also § 281, *supra*.

² *Knowlton v. Congress, etc. Co.*, 14 Blatchf. 364 (1877); S. C., 14 Fed. Cas. 797; *aff'd*, *Spring Co. v. Knowlton*, 103 U. S. 49 (1880); *Reed v. Boston Machine Co.*, 141 Mass. 454 (1886). See the dissenting opinion of Dwight, Com'r, in *Knowlton v. Congress, etc. Co.*, 57 N. Y. 518, 540 (1874). This case, however, was not strictly a case of overissued stock. A different class of cases exists where an increase of capital stock is authorized, but is irregularly made. A subscriber is then liable. See § 288, *supra*.

the stock of the corporation to which the note was given, and the directors subsequently made an illegal and unauthorized increase in the stock, the maker of the note having had notice that a large amount of illegal stock had been issued, and that the illegal and valid stock could not be distinguished.¹ But it is held that one who subscribes for overissued stock, *bona fide*, upon discovering that the stock is spurious cannot have a receiver appointed, pending an inquiry into the legality of the stock, to the end that, in case the stock is judicially declared invalid, such subscriber may recover back from the corporation the money so paid for the spurious shares, where the money received by the company had not been kept separate from its general funds, and could not be traced and identified.²

¹ *Merrill v. Gamble*, 46 Iowa, 615 (1877); *Merrill v. Beaver*, 46 Iowa, 646 (1877); *Merrill v. Reaver*, 50 Iowa, 404 (1879). ² *Whelpley v. Erie R'y*, 6 Blatchf. 271 (1868); S. C., 29 Fed. Cas. 918.

PART II.

TRANSFERS OF STOCK.

CHAPTER XVIII.

LEGACIES AND GIFTS OF STOCK.

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| <p>§ 299. Definitions of general, specific, and demonstrative legacies of stock.</p> <p>300, 301. Importance of the difference between general and specific legacies.</p> <p>302, 303. Legacies of stock are construed to be general if the language will permit.</p> | <p>§§ 304, 305. Amount of stock conveyed by certain legacies.</p> <p>306. Ademption or revocation of a legacy of stock, and abatement.</p> <p>307. Duty of executor as regards specific or general legacies.</p> <p>308. Gifts of stock.</p> |
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§ 299. *Definitions of general, specific, and demonstrative legacies of stock.*—A general legacy of stock is a legacy whereby it becomes the duty of the executor or administrator to give to or procure for the legatee a certain amount of stock, as indicated by the will, there being nothing in the will itself to indicate that the legacy is to be satisfied from stock actually owned by the testator. A specific legacy of stock arises when the testator, in his will, directs or clearly indicates that the legacy is to be satisfied from stock which he owns. A demonstrative legacy of stock is the same as a general legacy, except that it is to be purchased from a particular fund of the estate. Demonstrative legacies of stock are of little importance as compared with the other two kinds.¹

¹That a legacy of stock may be demonstrative, see *Ives v. Canby*, 48 Fed. Rep. 718 (1891). That legacies of stock may be demonstrative has been assumed by the cases. In the case, however, of *Eckfeldt's Estate*, 7 W. N. Cas. 19 (1879), the court says that a legacy of stock "may be either specific or general, according to the circumstances. It is never demonstrative. A demonstrative legacy is always pecuniary—differing, however, from an ordinary legacy in being referred to a particular fund or source of payment." A bequest to a wife of "the sum of \$8,000 invested in stocks, the interest to be paid to her during her life," is a demonstrative legacy. *Johnson v. Conover*, 54 N. J. Eq. 333 (1896).

§ 300. *Importance of the difference between general and specific legacies.*—It is frequently of the greatest importance whether a legacy be a general or a specific one. A large number of decisions, running back for nearly two hundred years, have been made in endeavoring to lay down rules on this subject. The complications, contradictions, inconsistent decisions, and doubt that have arisen from the inherent difficulties of the subject are frequently adverted to and deplored by successive generations of judges.

The importance of determining whether a legacy of stock is general or specific rests in the fact that if it is specific it is entitled to certain advantages, and, on the other hand, is exposed to certain perils; while, if it is general, it is without those advantages, but is also free from the perils. The advantages of a specific legacy of stock are that debts of the estate are to be paid from other funds; the specific legacy passes, though other legacies fail partially or wholly by reason of deficiencies in the estate; and the specific legatee is entitled to all dividends declared after the testator's death, instead of losing the first year's dividends, as in case of a general legacy of stock. General legacies of stock have none of these advantages. On the other hand, a specific legacy of stock is open to the great danger of being revoked by the acts of the testator, and frequently so when the testator has no intention of revoking the legacy.¹ This revocation, arising by implication from the acts of the testator—

¹ *Kenkel v. Macgill*, 56 Md. 120 (1880), the court saying: "If the legacy is to be considered specific, then, in the event of the testator's parting with the thing or property bequeathed, or if from any cause it should be lost or destroyed, the legacy fails. Then, again, such legacies are not liable to abatement with general legacies, nor are they liable to contribution towards the payment of debts." Where evidently the intent was to give specific bonds, it was so decreed. *Davies v. Fowler*, L. R. 16 Eq. 308 (1873); *Walton v. Walton*, 7 Johns. Ch. 257 (1823); *Jacques v. Chambers*, 2 Coll. 435 (1846), holding also that the legatee may select his stock from differ-

ent classes, but that he must pay calls on the stock due at the time of the testator's death, but not paid. In *Mullins v. Smith*, 1 Dr. & Sm. 204 (1860), the difference between a specific and demonstrative legacy is thus described: "The points of difference between specific and demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends

such as selling the stock bequeathed, or using it in any way inconsistent with the idea of its passing under the will—is a danger that does not exist if the legacy is a general one, since general legacies of stock may be carried out by the executor's purchasing the stock for the purpose of the legacy.

§ 301. If a specific legacy will apply equally to paid-up stock and to stock not paid up, the legatee may take the former.¹ If the testator has made payments on the stock before calls have been made, the legatee is entitled to the benefit.² If there is both a specific and a general legacy of the same stock, the specific is to be first satisfied.³ The specific legatee takes all the income and profits of the stock,⁴ whereas the general legatee has no interest in the stock until twelve months after the testator's death.⁵ The specific legatee takes the stock, although there will then be no property left to pay pecuniary legacies.⁶ However, he can have only so much stock of that kind as the testator dies possessed of;⁷ and if the latter dies possessed of none, the specific legatee takes none.⁸ The specific legatee does not take dividends declared and due before the testator's death, although such dividends have not been collected.⁹

§ 302. *Legacies of stock are construed to be general if the language will permit.*—It is the policy of courts of justice to uphold and carry out a legacy, and implied revocations are not looked upon with favor. Accordingly, in order to avoid the danger of ademption, to which specific legacies are subject, the rule has become established that general legacies are to be favored by the courts; and, if there is doubt as to whether a legacy be specific or general, it will be construed to be of the latter kind.¹⁰

which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death."

¹ Millard v. Bailey, L. R. 1 Eq. 378 (1866); Jacques v. Chambers, 2 Coll. 435 (1846).

² Tanner v. Tanner, 11 Beav. 69 (1848).

³ Barton v. Cooke, 5 Ves. Jr. 461 (1800).

⁴ Loring v. Woodward, 41 N. H. 391 (1860), holding also that parol evi-

dence cannot show a contrary intent of the testator.

⁵ Webster v. Hale, 8 Ves. Jr. 410 (1803).

⁶ Drinkwater v. Falconer, 2 Ves. Sr. 622 (1755).

⁷ Gordon v. Duff, 28 Beav. 519 (1860); Ashton v. Ashton, 3 P. Wms. 384 (1735).

⁸ Evans v. Tripp, 6 Mad. 91 (1821).

⁹ Perry v. Maxwell, 2 Dev. Eq. (N. C.) 488 (1834).

¹⁰ Davies v. Fowler, L. R. 16 Eq. 308 (1873); Tift v. Porter, 8 N. Y. 516, 520

Where, however, the intent of the testator clearly was to give particular stock owned by him, the court will declare the legacy to be a specific one. Thus, where the testator gives the legacy of stock by describing it as "my" stock, the legacy is a specific one.¹ So also where the phrase "standing in my name"² is used, or "which I hold;"³ or a direction is given to make up the specified amount from the general fund if the testator does not hold enough;⁴ or the testator describes the stock as "now lying in the three per cents;"⁵ or uses the word "such;"⁶ or makes a legacy of stock out of a quantity of stock; or in

(1853); *Eckfeldt's Estate*, 7 W. N. Cas. (Pa.) 19 (1879).

¹ *Walton v. Walton*, 7 Johns. Ch. 258 (1823); *Loring v. Woodward*, 41 N. H. 391 (1860); *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35 (1838); *Miller v. Little*, 2 Beav. 259 (1840); *Hayes v. Hayes*, 1 Keen, 97 (1836); *Brainerd v. Cowdrey*, 16 Conn. 1 (1843). The omission of the word "my" does not necessarily make the legacy a general one. *Avelyn v. Ward*, 1 Ves. Sr. 420 (1749). The word "my" does not, however, have the same significance in its application to a legacy of an annuity as it has to a legacy of stock. *Kirby v. Potter*, 4 Ves. Jr. 748 (1799). In the case of *Parrott v. Worsfold*, 1 Jac. & W. 574 (1820), a legacy of "all my stock that I may be possessed of at my decease" was held to be general, since there was no "individual thing given." Bequests in different sums to different legatees of "my" stocks and bonds at their par value, not describing them particularly, are general legacies. They are not void for uncertainty. *Re Hadden's Will*, 9 N. Y. Supp. 453 (1888).

² *Ludlam's Estate*, 13 Pa. St. 188 (1850); *Gordon v. Duff*, 28 Beav. 519 (1860); *Kampf v. Jones*, 2 Keen, 756 (1837). Where, however, other parts of the will indicate that the legacy was general, it was held to be general. See *Auther v. Auther*, 13 Sim. 422 (1843), holding also that though, by the delay of the executor beyond a year

in purchasing the stock, it rises, the legatee is entitled to the same amount as if it had been bought at the right time. *Fidelity, etc. Co.'s Appeal*, 108 Pa. St. 492 (1885).

³ *Blackstone v. Blackstone*, 3 Watts (Pa.), 335 (1834).

⁴ *Townsend v. Martin*, 7 Hare, 471 (1849), holding that such a legacy is specific and not demonstrative. *McGuire v. Evans*, 5 Ired. Eq. (N. C.) 269 (1848), however, holds that a legacy of stock, to take effect in case other legacies do not absorb that stock, is demonstrative; also that in case of legacies of the same stock to two different persons, each takes a moiety. The cases of *Mullins v. Smith*, 1 Dr. & Sm. 204 (1860); *Fontaine v. Tyler*, 9 Price, Exch. 94 (1821); and *Queen's College v. Sutton*, 12 Sim. 521 (1842), hold that such a legacy is specific if the testator leaves stock enough, but is general if he does not leave enough.

⁵ *Morley v. Bird*, 3 Ves. Jr. 628 (1798), holding that if the executor has sold the stock the legatees may hold him liable for its value one year after the testator's death.

⁶ *Davies v. Fowler*, L. R. 16 Eq. 308 (1873), the court saying that a legacy is specific when a meting out or dividing is evidently intended.

⁷ *Hosking v. Nicholls*, 1 Y. & C. Ch. 478 (1842). And if the administrator has paid the dividends to another, he is personally liable. A legacy of "ten shares of the stock of

another part of the will speaks of the stock as that of which the testatrix may be possessed;¹ or where, after several legacies, all apparently general, the testator bequeaths the remaining stock "standing in my name," — the effect of all these is that the legacies are specific.² A legacy of all the dividends, interest, and proceeds from stock is a specific legacy, even though the testator did not own such stock at the time he made the will.³ There has been some difference of opinion as to whether the fact that the testator, at the time of making the will, possessed an equal or greater amount of stock than that bequeathed, and of the same kind, is to be taken as evidencing an intent to make the legacy specific. The weight of authority holds that such a fact is not to be taken into consideration, and that if the words of the legacy make it general, it cannot be construed to be specific simply because by an examination of the testator's effects he is found to have possessed stock similar to that described in the will.⁴

§ 303. The most common form of a general bequest of stock is where the testator merely bequeaths a specified number of

the W. & N. R. Co." is a specific legacy, where a subsequent clause bequeaths "the balance of my stock as per my stock book." *Harvard Unitarian Soc. v. Tufts*, 151 Mass. 76 (1890).

¹ *Measure v. Carleton*, 30 Beav. 538 (1862). This case also holds that, if an exact partition of the stock is impossible, enough will be sold to render it possible.

² *Sleech v. Thorington*, 2 Ves. Sr. 560 (1754). A legacy of all of several articles is specific. *Tomlinson v. Bury*, 145 Mass. 346 (1887).

³ *Stephenson v. Dowson*, 3 Beav. 342 (1840). See also *Fidelity Trust Co.'s Appeal*, 108 Pa. St. 492 (1885).

⁴ *Robinson v. Addison*, 2 Beav. 515 (1840), the court holding that the legacy was general, and saying the testator "in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given;" *Davis v. Cain*, 1 Ired. Eq. (N. C.) 304 (1840); *Bronsdon v. Winter*, Ambl. 56 (1738); *Simmons v. Val-*

lance, 4 Bro. Ch. 346 (1793); *Bishop of Peterborough v. Mortlock*, 1 Bro. Ch. 565 (1784); *Boys v. Williams*, 2 Russ. & M. 689 (1831); *Partridge v. Partridge*, Cas. t. Talb. 226 (1736); *Tift v. Porter*, 8 N. Y. 516 (1853), where the court say: "The mere possession by the testator, at the date of his will, of stock of equal or larger amount than the legacy, will not of itself make the bequest specific;" *Osborne v. McAlpine*, 4 Redf. (N. Y.) 1 (1878); *Eckfeldt's Estate*, 7 W. N. Cas. (Pa.) 19 (1879); *Sponsler's Appeal*, 107 Pa. St. 95 (1884), where the court also held that a codicil repeating a general legacy of stock will entitle the legatee to both legacies. In Massachusetts a doctrine contrary to that stated in the text prevails. See *White v. Winchester*, 23 Mass. 48 (1827); *Metcalf v. First Parish*, 128 Mass. 370 (1880). To same effect, *Cuthbert v. Cuthbert*, 3 Yeates (Pa.), 486 (1803); *Jeffreys v. Jeffreys*, 3 Atk. 120 (1744).

shares of a specified kind to the legatees, without any further words indicating that he then held or expected to hold the stock bequeathed.¹ A direction to the executors to invest a certain sum in specified stock for the benefit of the legatee is a general legacy.² So, also, where the executors are directed to transfer to the legatee certain stock.³ A legacy of the residue of the testator's stock has been held to be a general legacy.⁴ A legacy to be paid "out of the four per cents" is general.⁵ A codicil which is general in form is held to be such, although it is but an increase of a previous legacy which is specific, and which is revoked by the codicil.⁶

§ 304. *Amount of stock conveyed by certain legacies.*—A legacy of "one hundred pounds, long annuities," has been held to mean, not that the legatee is entitled to an annual income from the estate of one hundred pounds, but that he was entitled to have that amount invested for him.⁷ A will reciting the amount of stock held by the testatrix, and bequeathing it, or so much as should be standing in her name at her death, does not give to the legatee stock acquired after the making of the will and before the death of the testatrix.⁸ A bequest of stock

¹ *Wilson v. Brownsmith*, 9 Ves. Jr. 180 (1803), holding also that, if there is not enough of such stock among the testator's assets, the deficiency must be purchased for the legatee. *Pearce v. Billings*, 10 R. I. 103 (1871), the court saying that the evident intent of the testator was "to have the stock mentioned purchased for the legatees by his executor, or to have the legatees furnished with the means to purchase the stock for themselves." The value of the stocks one year after the testator's death is the amount to be paid to the legatees. In the case of *Purse v. Snapple*, 1 Atk. 414 (1737), where two legacies of stock of 5,000*l.* each were given, and the testator had but 5,000*l.* of stock, the court held that the general estate must purchase 5,000*l.* of the same stock.

² *Raymond v. Brodbelt*, 5 Ves. Jr. 199 (1800).

³ *Lambert v. Lambert*, 11 Ves. Jr.

607 (1806); *Sibley v. Perry*, 7 Ves. Jr. 522 (1802), the court saying a legacy is not specific "without something marking the specific thing—the very corpus; without describing it as standing in his name, or by the expression of 'my stock,' etc."

⁴ *Parrott v. Worsfold*, 1 Jac. & W. 574 (1820). *Contra*, *Bethune v. Kennedy*, 1 Myl. & C. 114 (1835).

⁵ *Deane v. Test*, 9 Ves. Jr. 146 (1803).

⁶ *Johnson v. Johnson*, 14 Sim. 313 (1844).

⁷ *Atty. Gen. v. Grote*, 2 Russ. & M. 699 (1827); *Fonnereau v. Poyntz*, 1 Bro. Ch. 472 (1785). See *Pearce v. Billings*, 10 R. I. 102 (1871). *Contra*, *Stafford v. Horton*, 1 Bro. Ch. 482 (1785). See also § 560, *infra*.

⁸ *Hotham v. Sutton*, 15 Ves. Jr. 319 (1808). So, also, of a legacy of "the whole of my stock in the Housatonic Bank, amounting to \$6,000." The legatee does not take stock subsequently acquired. *Foot's Appeal*, 39

"that I possess" is held to mean stock possessed by the testator at the time of making the will.¹

§ 305. There has been some controversy and doubt as to whether a legacy of the testator's "money" would give to the legatee the testator's stock in a corporation. The decided weight of authority holds that it does not.² Nor will shares of stock belong to a legatee to whom the testator has given, by a last will and testament, his "securities for money;"³ or "furniture . . . with all claims or demands of whatever nature,"⁴

Mass. 299 (1839); *Douglas v. Douglas*, Kay, 404 (1854). The case of *Fidelity Trust Co.'s Appeal*, 108 Pa. St. 492 (1885), states that at common law a specific legacy of stock spoke from the death of the testator, and that the English Wills Act of 1838, and the Pennsylvania act of 1879, were but declaratory in that respect. If the testator, in making a specified bequest of stock, speaks of the stock as "now standing in my name," the statute does not apply, and the bequest speaks from the date of the will. In *Miller v. Little*, 2 Beav. 259 (1840), the testator gave one share to each child him surviving. He then had eight shares and seven children. At his death he had ten shares and eleven children. Only the eight shares were held to pass.

¹*Cockran v. Cockran*, 14 Sim. 248 (1844). This rule is sometimes changed by statute. See, in England, § 24, Wills Act (1 Vict., c. 26), applied in *Trinder v. Trinder*, L. R. 1 Eq. 695 (1866), and *Goodlad v. Burnett*, 1 K. & J. 341 (1855); *Hepburn v. Skirving*, 4 Jur. (N. S.) 651 (1858); *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229 (1869); *Bothamley v. Sherson*, L. R. 20 Eq. 304 (1875), and preceding note. Legacy of bank stock conveys all stock deposited in bank, there being no shares of bank stock owned by the testator. *Tomlinson v. Bury*, 145 Mass. 346 (1887). A will may bequeath not only the stock standing in the name

of the testatrix, but also certificates of stock owned by her but standing in the name of others. *Angell v. Springfield Home*, 157 Mass. 241 (1892).

²*Mullins v. Smith*, 1 Dr. & Sm. 204 (1860); *Hotham v. Sutton*, 15 Ves. Jr. 319 (1808); *Lowe v. Thomas*, Kay, 369 (1854), affirming 5 De G., M. & G. 315 (1854); *Gosden v. Dotterill*, 1 Myl. & K. 56 (1832); *Hudleston v. Gouldsbury*, 10 Beav. 547 (1847); *Douglas v. Congreve*, 1 Keen, 410, 424 (1836); *Willis v. Plaskett*, 4 Beav. 208 (1841); *Ogle v. Knipe*, L. R. 8 Eq. 434 (1869); *Ommanney v. Butcher*, 1 Turn. & R. 260, 272 (1823), holding also that a bequest of stock for an indefinite charity fails; *Beck v. McGillis*, 9 Barb. 35, 59 (1850). *Contra*, *Waite v. Combes*, 5 De G. & S. 676 (1852); *Chapman v. Reynolds*, 28 Beav. 221 (1860), where the testator had no property but stock; *Bescoby v. Pack*, 1 Sim. & Stu. 500 (1823), holding that the words "securities for money" will pass the "funds," but not deciding as to stock in private corporations; *Newman v. Newman*, 26 Beav. 218 (1858), where the legacy was of "surplus money;" *Jenkins v. Fowler*, 63 N. H. 244 (1884). "All my money" may include stock. *Re Buller*, 74 L. T. Rep. 406 (1896).

³*Turner v. Turner*, 21 L. J. (Ch.) 843 (1852). See also *Bescoby v. Pack*, 1 Sim. & Stu. 500 (1823).

⁴*Delamater's Estate*, 1 Whart. (Pa.) 362 (1836).

or "every other article,"¹ or "goods,"² or "money and effects;"³ but they will pass under a bequest of the "personal estate,"⁴ or "residue of money,"⁵ or "chattels."⁶ "Gas stock to the extent of six thousand dollars" means \$6,000 at par.⁷ If the testator, in describing the stock bequeathed, has very clearly made a mistake in the description, the legacy will be held to apply to the stock intended to be bequeathed. Thus, where the testator has "City Bank" stock, but bequeaths "Mechanics' Bank" stock, and the intent was to bequeath the former, the court will render a decree to that effect.⁸ Where, subsequently to the making of the will, and before the death of the testator, the stock bequeathed is changed in its character by operation of law, the legatee will nevertheless be entitled to the stock in its new form.⁹

In England, where "shares" corresponds to the American "stock," but "stock" is a term applicable to a paid-up interest,

¹ *Collier v. Squire*, 3 Russ. 467 (1827).

² *Cowling v. Cowling*, 26 Beav. 449 (1859). *Contra*, *Kendall v. Kendall*, 4 Russ. Ch. 360 (1828). Stock passes under a legacy of "my property at R.'s bank," the certificates being there. *Re Prater*, L. R. 37 Ch. D. 481 (1888).

³ *Borton v. Dunbar*, 30 L. J. (Ch.) 8 (1860). "Ready money" covers uncollected dividends. *May v. Grave*, 3 De G. & Sm. 462 (1849).

⁴ *Kermode v. Macdonald*, L. R. 3 Ch. App. 584 (1868).

⁵ *Dowson v. Gaskoin*, 2 Keen, 14 (1837); *Fulkeron v. Chitty*, 4 Jones, Eq. (N. C.) 244 (1858).

⁶ *Kendall v. Kendall*, 4 Russ. Ch. 360 (1828).

⁷ *Re Johnson's Estate*, 170 Pa. St. 177 (1895).

⁸ *Roman, etc. Asylum v. Emmons*, 3 Bradf. (N. Y.) 144 (1855); *Door v. Geary*, 1 Ves. Sr. 255 (1749), holding that a bequest of "East India stock" will apply to bank stock, when the testator had the latter but none of the former. See also *Trinder v. Trinder*, L. R. 1 Eq. 695 (1866), where a legacy of "Great Western Railway"

stock was held to apply to the stock of a road absorbed by the Great Western Railway; *Oakes v. Oakes*, 9 Hare, 666 (1852), where a bequest of "shares" was held to apply to "stock;" *Gallini v. Noble*, 3 Mer. Ch. 691 (1810); *Penticost v. Ley*, 2 Jac. & W. 207 (1820); *Clark v. Atkins*, 90 N. C. 629 (1884), where "bank stock" was held to pass bonds. A palpable mistake of the testator in describing a legacy of bonds will be corrected by the court. *Holt v. Jex*, 48 Hun, 528 (1888). A legacy of "12 shares in the steam barge J." may be shown to be twelve shares in the corporation owning the steam barge J., and may be shown to intend shares worth \$1,000 each, even though the par value of the shares is only \$50 each, but the testator considered them as of \$1,000 par value each. *Oades v. Marsh*, 69 N. W. Rep. 251 (Mich., 1896). A legacy of "£400 invested in the B. Company" means four hundred shares in that company, the testator having five hundred shares of £1 each and the shares being worth £1 10s. each. *Re Buller*, 74 L. T. Rep. 406 (1896).

⁹ See p. 591, note 7, *infra*.

which, like a bank deposit, may be used in large or small quantities, a bequest of "shares" does not pass "stock" if there be any "shares" to which the legacy may apply.¹ The words "funds" or "public funds" will include long annuities;² and "foreign funds" means securities guaranteed by foreign governments;³ but "funds" will not include bank stock,⁴ nor East India stock.⁵ A legacy of "securities" does not carry shares of stock.⁶ An unconditional bequest of the dividends of stock is a bequest of the stock itself.⁷ But a bequest of a specific sum to be paid from stock does not bequeath the stock itself, although amounting to a charge upon it.⁸ A bequest of stock to a legatee "to draw the income arising therefrom during her life-time, and at her death to dispose of the same as she shall see fit," vests the title to the stock, when it is set apart, in the legatee, even though the executors are directed to collect and pay to her the dividends.⁹ A bequest of the "rest and residue after deducting" certain specific legacies of stock includes those legacies, if they have lapsed by reason of the death of the legatees.¹⁰ A general bequest of stock applies to partly-paid as well as to full-paid stock.¹¹ Legacies may be made of stock over

¹ *Oakes v. Oakes*, 9 Hare, 666 (1852).

² *Howard v. Kay*, 27 L. J. (Ch.) 448 (1858).

³ *Ellis v. Eden*, 23 Beav. 543 (1857); *Cadett v. Earle*, L. R. 5 Ch. D. 710 (1877), properly holding that New York and Ohio are foreign governments. Cf. *Langdale's Trusts*, L. R. 10 Eq. 39 (1870), relative to French railway securities.

⁴ *Slingsby v. Granger*, 7 H. L. Cas. 273 (1859).

⁵ *Brown v. Brown*, 4 K. & J. 704 (1858).

⁶ *Re Maitland*, 74 L. T. Rep. 274 (1896).

⁷ A bequest of dividends and income to an institution as a permanent fund is an absolute gift of the stock. *Angell v. Springfield Home*, 157 Mass. 241 (1892); *Collier v. Collier*, 3 Ohio St. 369 (1854); *Haig v. Swiney*, 1 Sim. & Stu. 487 (1823); *Page v. Leapingwell*, 18 Ves. Jr. 463 (1812); *Fox v. Carr*, 16 Hun, 566 (1879), in-

volving a similar question. Cf. *Blann v. Bell*, 2 De G., M. & G. 775 (1852), holding that this rule applies only to the "funds," but not to stock in private corporations. A legacy of stock to A., "the dividends derived from the same to be paid to her by B., whom I name as trustee for said stocks and bonds, as said dividends may accrue from time to time," passes complete title to the legatee. No trust exists. *Arnold's Appeal*, 6 Atl. Rep. 751 (Pa., 1886).

⁸ *Wilson v. Maddison*, 2 Y. & C. Ch. 372 (1843).

⁹ *Onondaga Trust, etc. Co. v. Price*, 87 N. Y. 542 (1882).

¹⁰ *Carter v. Taggart*, 16 Sim. 423 (1848); *Shuttleworth v. Greaves*, 4 Myl. & Cr. 35 (1838), holding that a legacy of stock lapses as to those dying before the testator, though it is given to them, "their executors, administrators, and assigns."

¹¹ *Emery v. Wason*, 107 Mass. 507

which the testator has the power of appointment,¹ and a will may provide for an annuity to be derived from stock.² In all these cases the intention of the testator is the "pole star" of the courts.

§ 306. *Ademption or revocation of a legacy of stock, and abatement.*—The ademption of a legacy is a revocation of that legacy in part or wholly, not by an express revocation in the will, but by the acts of the testator. Consequently, an ademption applies only to specific legacies.³ An ademption of a specific legacy of stock generally arises by a sale of the stock by the testator. If the specific stock bequeathed is not owned by the testator at the time of his death, the legal conclusion is that the specific legacy is adeemed, and the legatee takes nothing.⁴ A sale of the stock by the testator after the will is made revokes or adeems the legacy, and it is as if never made.⁵ A codicil giving all the "personal estate" to another is a revocation

(1871). This case holds also that, where a call on the stock becomes due the day after the testator died, it was the duty of the executor to pay it from the general fund.

¹ See *Re Davids's Trusts*, 1 Johns. 495 (1859); *Innis v. Sayer*, 3 Mac. & G. 606 (1851); *Lownds v. Lownds*, 1 You. & Jer. 445 (1827); *Nannock v. Horton*, 7 Ves. Jr. 391 (1802); *Re Gratwick's Trusts*, L. R. 1 Eq. 177 (1865); *Warren v. Postlethwaite*, 2 Coll. Ch. 116 (1845); *Walker v. Mackie*, 4 Russ. Ch. 76 (1827), disapproved in *Hughes v. Turner*, 3 Myl. & K. 666, 697 (1835).

² As to the construction of different provisions in wills, where an annuity on stock is created, see *Innes v. Mitchell*, 9 Ves. Jr. 212 (1803); *Kerr v. Middlesex Hospital*, 2 De G., M. & G. 576 (1852); *Ross v. Borer*, 2 John. & H. 469 (1862); *Yates v. Maddan*, 3 Mac. & G. 532 (1857); *Blewitt v. Roberts*, *Craig & P.* 274 (1841); *Potter v. Baker*, 13 Beav. 273 (1851); *Robinson v. Hunt*, 4 Beav. 450 (1841); *Hedges v. Harpur*, 3 De G. & J. 129 (1858); *Evans v. Jones*, 2 Coll. Ch. 516 (1846); *Mansergh v. Campbell*, 3 De G. & J. 232 (1858).

³ A bequest of \$2,000 of certain bonds is demonstrative and not specific and not adeemed where the testator had \$10,000 of such bonds and sold them. *Ives v. Canby*, 48 Fed. Rep. 718 (1891). A legacy of stocks aggregating two thousand two hundred shares "now owned by me and standing in my name on the books of" the company is not specific, so as to be subject to ademption, although in the meantime the testator has sold three thousand and fifty-seven shares out of three thousand two hundred and fifty-seven. *Mahoney v. Holt*, 36 Atl. Rep. 1 (R. I., 1896).

⁴ *Ford v. Ford*, 23 N. H. 212 (1851), although not a stock case, says in regard to this branch of the law: "It is now established in England that the only question is whether the specific thing remains at the death of the testator, and that the intention to adeem will not be considered beyond the expressions in the will. . . . The weight of American authority is in favor of the English rule."

⁵ *Ashburner v. Macguire*, 2 Bro. Ch. 108 (1786); *White v. Winchester*, 23 Mass. 48 (1827); *Humphreys v. Humphreys*, 2 Cox, Ch. 184 (1789);

of a bequest of stock in the original will.¹ Where the testator specifies the amount of his stock, the specific legatees of it abate proportionately with the residuary legatee, if upon his death it is insufficient.² The rule is otherwise if no mention is made of what amount of stock he owns.³ If the general property of the testator is exhausted in the payment of the debts of the estate, specific legacies of stock abate proportionately with other specific legacies.⁴ A specific legacy of stock is not adeemed by a change in the stock produced by an act of the government. Thus, where the government buys the stock, a specific legatee takes the compensation if it has not yet been collected by the testator,⁵ but not if it has been collected and used by the latter.⁶ A change by law of the funds into funds bearing a lower rate of interest does not adeem a specific legacy of it,⁷ even though the testator sells the former and buys the latter kind of funds.⁸ A specific legacy of stock by a *feme covert*, who had the power to bequeath it, is not adeemed by the fact that she had the stock transferred into her own name after the death of her husband.⁹ A specific legacy which has been adeemed is not revived by a republication of the will after the ademption.¹⁰

Hayes v. Hayes, 1 Keen, 97 (1836);
Blackstone v. Blackstone, 3 Watts
(Pa.), 335 (1834).

¹ Kermode v. Macdonald, L. R. 1
Eq. 457 (1866); affirmed, L. R. 3 Ch.
App. 584 (1868).

² Elwes v. Causton, 30 Beav. 554
(1862), following Page v. Leaping-
well, 18 Ves. 463 (1812).

³ Petre v. Petre, 14 Beav. 197 (1851);
De Lisle v. Hodges, L. R. 17 Eq. 440
(1874); Vivian v. Mortlock, 21 Beav.
252 (1855). The debts of the estate
may be directed to be paid from the
residue of the stock. Choat v. Yeats,
1 Jac. & W. 102 (1819).

⁴ Sparks v. Weedon, 21 Md. 156
(1864). When general legacies of
stock abate proportionately with
other general legacies, the stock is
estimated at its value twelve months
after the testator's death. Black-
shaw v. Rogers (1780), cited in 4 Bro.
Ch. 349.

⁵ Walton v. Walton, 7 Johns. Ch.
258 (1823).

⁶ Ludlam's Estate, 13 Pa. St. 188
(1850).

⁷ Brown v. McGuire, 1 Beatty, Ir.
Ch. 358 (1829). But a legacy of stock
in an incorporated unlimited com-
pany, which, after the making of the
will, is incorporated as a limited com-
pany, and the value of the stock
changed, which change the testator
accepts, fails, whether considered as a
specific legacy adeemed, or a general
legacy impossible of fulfillment. *Re*
Gray, L. R. 36 Ch. D. 205 (1887).

⁸ Partridge v. Partridge, Cas. t. Talb.
226 (1736). Roper, Legacies, p. 331,
2d ed. (1848), is inclined to the opinion
that a specific legacy of stock is not
revived by a purchase of similar stock
after a sale of the stock bequeathed.
⁹ Dingwell v. Askew, 1 Cox, Ch. 427
(1788).

¹⁰ Harvard Unitarian Soc. v. Tufts,
151 Mass. 76 (1890).

§ 307. *Duty of executor or administrator as regards a specific or general legacy of stock.*—Where a legacy of stock is made, it is the duty of the executor or administrator to carry into effect the wishes of the testator by turning over to the legatee the stock bequeathed, if the legacy be specific; or, if the legacy be general, by either setting aside for the legatee the required amount of stock from the testator's effects, or purchasing the same for the legatee. The specific legacy of stock vests in the legatee as soon as the executor is satisfied that the general fund will pay the debts of the estate and consents to such vesting. When once given the consent of the executor is irrevocable, and only a court of chancery can reach the stock and subject it to the testator's debts.¹ The liability of the legatee to pay calls on the stock is discussed elsewhere.² Where stock in a Maryland bank is owned by a citizen of Delaware, the law of Delaware governs a legacy of such stock.³

§ 308. *Gifts of stock.*—Shares of stock in a corporation may be the subject of a gift. No formal method of carrying out the gift is necessary. A formal instrument of transfer, duly delivered to an agent with directions to deliver to the donee, vests title in the donee, though no certificates are transferred.⁴ A gift of stock, vested by a due transfer into the name of the

¹ Onondaga Trust, etc. Co. v. Price, 87 N. Y. 542 (1882); Hill v. Rockingham Bank, 44 N. H. 567 (1863), holding that the legatee should sue the corporation at law for refusing transfer, where the parties interested in the will assent; and in equity, if both the corporation and such parties do not assent. A decree of a probate court that the legacy of stock shall be turned over to the legatee cannot be required by the corporation. Under the Vermont statute it is the duty of the executor to transfer stock to the residuary legatee. Witters v. Sowles, 25 Fed. Rep. 168 (1885). As regards sales of stock by an executor, see § 329, *infra*. If stock specifically bequeathed is not given to the legatee, but is used for other purposes, the other legatees must make

good its value. Tomlinson v. Bury, 145 Mass. 346 (1887). Executors in New York are not entitled to commissions on transfers of stock specifically bequeathed. Schenck v. Dart, 22 N. Y. 420 (1860). A legacy may be paid by the stock of the decedent at a valuation agreed upon. Chase v. Burritt, 14 Atl. Rep. 212 (Conn., 1888).

² See § 560, *infra*.

³ Lowndes v. Cooch, 39 Atl. Rep. 1045 (Md., 1898).

⁴ De Caumont v. Bogert, 36 Hun, 382 (1885), treating also a gift as an advancement. See S. C., *Re Morgan*, 104 N. Y. 74 (1887). In England, under the statutes, it is held that a gift of stock does not vest in the donee until registry on the corporate books. Nannev v. Morgan, L. R. 35 Ch. D. 598 (1887).

donee, cannot be revoked by the donor.¹ In order to constitute a gift a perfectly clear intent so to do must be proved.² Where the gift is made in gratitude for care to be bestowed on another, the gift will fail upon the death of the donee, if it is proved that the stock had not been fully and finally delivered.³ A gift of the dividend of stock is a gift of the stock itself.⁴ A gift of stock by one legatee to another, in the belief that the testator so intended the stock to be disposed of, cannot be revoked after an unsealed instrument of transfer is signed and actual transfer made, even though it is afterwards found that the testator had no such intent.⁵ A stockholder who has transferred his stock into the joint names of himself and his wife cannot dispose of his interest by a last will and

¹ *Standing v. Bowring*, L. R. 27 Ch. D. 341 (1884), where the donor transferred into the joint names of donor and donee, and afterwards attempted to dispose of the whole stock. A gift of stock fully made and accepted cannot be retracted. *Walker v. Joseph, etc. Co.*, 47 N. J. Eq. 342 (1890). A father who takes stock in the name of a son in order to qualify him as a director, and takes back the certificates, does not thereby make a gift of the stock. *Re Gooch*, 63 L. T. Rep. 384 (1890).

² Where, however, the stock is purchased by one in the name of another, it may be shown, as against the creditors of the former, that he intended the stock as a gift to the latter. *Rider v. Kidder*, 10 Ves. Jr. 360 (1805). A gift of stock to take effect only upon the death of the donor is not absolute, and is subject to the payment of his debts existing at the time of his death. *Sterling v. Wilkinson*, 83 Va. 791 (1887). A gift of stock whereby the owner makes himself a trustee of it for his donee is complete, and a recognition of the trust in his will does not render the stock a part of his estate, subject to the dower right of his wife. *Dickerson's Appeal*, 115 Pa. St. 198 (1887); *Stone v. Hackett*, 78 Mass. 227 (1858).

Although a person buys stock as trustee, and charges the price on his books against his daughters and credits them with dividends, yet if he sold the stock and used the money the stock was not an advancement to them. *Herkimer v. McGregor*, 126 Ind. 247 (1890). Where a stockholder transfers the certificate on the back to a person and leaves it in his own safe-deposit box, and writes a letter to such person directing him to distribute it among a list of charitable corporations, but no list is attached, the latter takes no title, and the executors may compel him to transfer the certificate to them. *Bliss v. Fosdick*, 76 Hun, 508 (1894).

³ *Jackson v. Twenty-third St. R'y*, 88 N. Y. 520 (1882). When a gift of stock is made in accordance with an agreement to compensate the donee for taking care of the donor, a delivery of the certificate without any transfer suffices. *Reed v. Copeland*, 50 Conn. 472 (1883). But the contract to make the gift must not be in opposition to public policy, nor in fraud of the rights of other stockholders. *Nickerson v. English*, 142 Mass. 267 (1886).

⁴ See § 305, *supra*.

⁵ *Delamater's Estate*, 1 Whart. (Pa.) 362 (1836).

testament. It passes to the wife as the survivor.¹ A gift of stock *causa mortis* may be made by a mere delivery of the certificate to the donee.² So, also, the delivery and acceptance of a gift of stock is held to be effectual, where the donor had the stock transferred into the name of the donee and took out certificates in the donee's name, even though the donor died before the donee knew of the gift.³ The owner of bonds may deposit them in trust with a trustee, with directions in writing to deliver them to certain persons upon the donor's death. Such persons are then entitled to them, although the donor col-

¹ *Dummer v. Pitcher*, 5 Sim. 35 (1831); *aff'd*, 2 M. & K. 262 (1833). A gift of stock direct from the husband to the wife is legal. She thereupon takes a sole and separate estate therein. *Deming v. Williams*, 26 Conn. 226 (1857). The case of *Francis v. New York, etc. R. R.*, 17 Abb. N. Cas. 1 (N. Y., 1885), holds that, when a gift of stock is made to a minor, it is complete and irrevocable, so far as the donor is concerned; but the minor may, upon attaining majority, either accept or refuse it. See S. C., 108 N. Y. 93 (1888).

² *Grymes v. Hone*, 49 N. Y. 17 (1873); *Walsh v. Sexton*, 55 Barb. 251 (1869); *Allerton v. Lang*, 10 Bosw. 362 (1863). The last two cases hold that the certificates need not even be indorsed or transferred, but that a mere delivery without any writing is sufficient. *Cf.* § 375, *infra*. A delivery of a certificate of stock without written assignment is not a good gift *inter vivos*. *Matthews v. Hoagland*, 48 N. J. Eq. 455 (1891). No delivery of stock to a wife as a gift exists where, after the husband's death, the stock is found among his papers in her possession and not indorsed. *Morse v. Meston*, 152 Mass. 5 (1890). Although no transfer is made of the certificate, yet if it is found among the papers of a deceased person it will be presumed to be his, though standing in the name of his sister, who also is dead, the stock having

been considered of little value by them. *Re Mapes's Estate*, 12 N. Y. Supp. 9 (1890). A *donatio causa mortis* of stock is revoked by the recovery of the donor, even though it is registered. *Staniland v. Willott*, 3 Macn. & G. 664 (1850). In England railway stock is not the subject of a *donatio causa mortis* by a delivery of the certificate, since the transfer can be by deed only. *Moore v. Moore*, 43 L. J. (Ch.) 617 (1874). A gift *causa mortis* of stock in a bank by mere manual delivery of the certificate, without any signature to the transfer thereof, is good where there is clear proof of the intent of the donor to make the gift. *Leyson v. Davis*, 17 Mont. 220 (1895). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. *Leyson v. Davis*, 170 U. S. 36 (1898).

³ *Roberts's Appeal*, 85 Pa. St. 84 (1877). In Maryland it is held that a mere transfer of the certificates of stock, without a registry on the corporate book, is incomplete as a gift, and cannot be enforced against the personal representatives of the deceased donor. *Baltimore Retort, etc. Co. v. Mali*, 65 Md. 93 (1886). But a written memorandum left by a de-

lected the coupons during his life.¹ Stock may be given away in trust, with the donor himself as the trustee, although no transfer is made on the corporate books.² Where a person, who is under contract to deliver certain stock, gives the stock to a relative for nothing, the party entitled to the stock by contract may compel such relative to give up the stock.³

cedent to the effect that he thereby gives certain stock to a person, but

¹ *Green v. Tulane*, 52 N. J. Eq. 169 (1893).

retains the same during life in order

² *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135 (1893).

that he, the donor, may have the dividends, is not a valid gift. *Re* Shield, 53 L. T. Rep. 5 (1885).

³ *Graham v. O'Connor*, 73 L. T. Rep. 712 (1896).

CHAPTER XIX.

WHO MAY BUY AND SELL STOCK.

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| <p>§§ 309, 310. Competency of a corporation to purchase shares of its own capital stock.</p> <p>311-313. Rule in the United States.</p> <p>314. The stock is not merged, and it may be sold by the corporation.</p> <p>315. Purchase by a corporation of stock in another corporation—Purchase by railroad.</p> <p>316. Purchases of stock by banks, and pledges to banks.</p> <p>317. Purchases of stock by insurance, manufacturing, and other corporations.</p> <p>318. Infants as purchasers of stock.</p> <p>319. Married women as purchasers, owners, or vendors of stock.</p> <p>320. Competency of miscellaneous parties—Joint operation.</p> | <p>§ 321. Sales, purchases, and transfers by agents.</p> <p>322. Purchase of stock by guardians, executors, and trustees.</p> <p>323, 324. Sale or pledge of stock by trustee in breach of his trust.</p> <p>325, 326. Transferee of stock from trustee is protected, when.</p> <p>327. Rights and liability of the corporation allowing a transfer by a trustee in breach of his trust.</p> <p>328. Sales of stock by a guardian.</p> <p>329. Sales by executor or administrator.</p> <p>330. Duty and liability of the corporation in sales by an executor or administrator.</p> |
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§ 309. *Competency of a corporation to purchase shares of its own capital stock.*—In England a long line of decisions has established the rule that, at common law, a corporation cannot purchase shares of its own capital stock.¹ This rule is enounced clearly and decisively, and is closely adhered to.² The corporation may be given an express power for this purpose; but,

¹ *Trevor v. Whitworth*, L. R. 12 App. Cas. 409 (H. L., 1887), reviewing many cases; *Re Marseilles Extension R'y*, L. R. 7 Ch. App. 161 (1871); *Evans v. Coventry*, 25 L. J. (Ch.) 489, 501 (1856); *Cross's Case*, 38 L. J. (Ch.) 583 (1869); *Morgan's Case*, 1 De G. & Sm. 750 (1849); *Ex parte Morgan*, 1 Macn. & G. 225 (1849); *Eyre's Case*, 31 Beav. 177 (1862). See also 3 R'y & Corp. L. J. 169. *Cf. Taylor v. Hughes*, 2 Jones & Lat. (Ir. Ch.) 24 (1844), holding that a banking company at common law may buy its own stock the same as a copartnership may buy out a partner. Where a director buys merchandise of his corporation, and

pays for it in stock of the corporation, and the transaction is ratified in general meeting, the director, on a winding up, is not liable for the value of the merchandise. *Weekes's Case*, 17 L. R. (Ir.) 239 (1885). A purchase by a corporation of its own stock and payment by debentures is void, and a resale of the stock at a discount is void. *Re London Celluloid Co.*, 39 Ch. D. 190 (1888).

² *Zulueta's Claim*, L. R. 5 Ch. App. 444 (1870); *Hope v. International Fin. Soc.*, L. R. 4 Ch. D. 327 (1876), holding also that a stockholder may enjoin the purchase; distinguishing *Teasdale's Case*, L. R. 9 Ch. App. 54 (1873).

unless so given, the purchase is held to be beyond the legal powers of the directors and of the whole body of stockholders.¹ The object of the rule is to preserve the rights of the corporate creditors, and also to confine the corporation within the express powers given it, and the implied powers necessary to its transaction of business.² If the sale is completed, and the corporation afterwards becomes insolvent, the stockholder who sold the stock to the corporation is liable, on the winding up, as though he never had made such a sale.³ If, however, the stockholder sells to a person, not knowing that the latter is purchasing as a trustee for the corporation, the vendor is not liable on such stock.⁴ The directors authorizing or directing a purchase

¹ *Zulueta's Claim*, L. R. 5 Ch. App. 444 (1870); *Hope v. International Financial Soc.*, L. R. 4 Ch. D. 327 (1876). See also *Lindley, Partn.*, p. 739 (ed. 1881). Under an express power to the directors to enter into any contract and engagement that seemed best for the company, such a purchase was upheld. *Singer's Case*, 4 W. N. 206 (1869); *Cockburn's Case*, 4 De G. & Sm. 177 (1850), where power was given by the deed of settlement. See, however, *Re Dronfield Silkstone Coal Co.*, L. R. 17 Ch. D. 76 (1880), where an express power to purchase its own stock was held not to authorize a trafficking in that stock — the buying and selling for purposes of gain. Where a company has power to purchase its own stock and does purchase stock which has not been paid up, the liability on that stock cannot be included as among the debts of the company. *Re Sovereign, etc. Co.*, [1892] 3 Ch. 279. Having purchased its own stock from profits, a company may reduce its capital stock to that extent. *Re York Glass Co.*, 60 L. T. Rep. 744 (1889). The corporation may purchase its own stock from a part of the stockholders as a means of reducing its capital stock. *British, etc. Corp. v. Couper*, [1894] A. C. 399. Companies with unlimited liability may,

under the English statute, provide for the retirement of stock by the company and the repayment of the money paid. *Re Borough, etc. Soc.*, [1898] 2 Ch. 242.

² Compare with the cases in the previous note, *Re Dronfield Silkstone Coal Co.*, L. R. 17 Ch. D. 76 (1880), where the court said: "If the company could not question it, neither can a creditor; for he can obtain nothing but what the company can get from the shareholders."

³ *Walters's Second Case*, 3 De G. & Sm. 244 (1850); *Richmond's Case*, 3 De G. & Sm. 96 (1849); *Munt's Case*, 22 Beav. 55 (1856), where the stockholders disagreed, and the corporation bought out one faction; *Daniell's Case*, 22 Beav. 43 (1856); *Bennett's Case*, 5 De G., M. & G. 284 (1854), where the stockholders disagreed concerning the validity of a lease, and the corporation bought out part. If however, the corporation, six years after the transfer, discovers that the transfer was invalid, and summarily retransfers to the vendor, the latter may apply to a court of equity to compel the corporation to keep the stock. *Gardiner v. Victoria Estates Co.*, 12 Ct. of Sess. (Sc. 4th ser.) 1356 (1885). See also § 251, *supra*.

⁴ *Nicol's Case*, 3 De G. & J. 387 (1859); *Grady's Case*, 1 De G., J. & S.

for the corporation of shares of its own capital stock are liable personally to the same extent that the selling stockholder would have been had the sale not taken place.¹ Generally the transfer is made, not to the corporation directly, but to a trustee on behalf of or for the benefit of the corporation. This practice is not at all necessary,² and has no effect other than a transfer direct to the corporation itself, unless it be that the vendor of the stock may not know that his vendee purchases for the corporation, and thereby escapes liability on the winding up. If the contract is executory, the corporation may repudiate it and refuse to pay the purchase-money for the stock.³ If, however, the sale is completed, the stock belongs to the corporation, and does not pass to the vendor's assignee in bankruptcy.⁴

§ 310. Where the transfer of stock to the corporation is made by one of the original subscribers for stock, it frequently becomes a difficult question to decide whether the transaction was a cancellation of the subscription contract or was a sale of the stock to the corporation. Each case turns largely on its own peculiar facts and circumstances. If the transaction is a cancellation, it is legal. In England, if it is a sale, it is illegal. The courts seem to favor a construction whereby the transaction is held to be a sale, and the stockholder made liable on the winding up.⁵

488 (1863), where the vendee was managing agent of the corporation, and the sale of the stock was to stop litigation. *Richmond's Case*, 3 De G. & Sm. 96 (1849), holds, however, that if the vendor's selling agent, his solicitor, knew that the sale was for the benefit of the corporation, the stockholder himself is chargeable with knowledge. See *Re Orpen*, 32 L. J. (Ch.) 633 (1863), holding that it is a question for the jury whether the vendee purchased for the corporation or for himself. See also § 251, *supra*.

¹ *Evans v. Coventry*, 25 L. J. (Ch.) 489, 501 (1856). To same effect, *Land Credit Co. v. Fermoy*, L. R. 8 Eq. 7 (1869); *Marzetti's Case*, 42 L. T. Rep. 206 (1880). The directors may have contributions from each other for

sums paid out by their authority for such purchases, and for which one or more has been held liable to the corporation. *Ashhurst v. Mason*, L. R. 20 Eq. 225 (1875).

² See ch. III, *supra*.

³ The corporation may even refuse to pay the price to the brokers employed by its directors to buy its stock. *Zulueta's Claim*, L. R. 5 Ch. App. 444 (1870). This, of course, does not authorize the corporation to retain the stock so purchased,

⁴ *Great Eastern Ry v. Turner*, 42 L. J. (Ch.) 83 (1872).

⁵ *Re United Service Co.*, L. R. 5 Ch. App. 707 (1870), distinguishing *Snell's Case*, L. R. 5 Ch. App. 22 (1869). See also *Thomas's Case*, L. R. 13 Eq. 437 (1872); *Teasdale's Case*, L. R. 9 Ch.

§ 311. *Rule in the United States.*—In this country there has been a difference of opinion as to whether a corporation may purchase shares of its own stock. In Illinois, Massachusetts, and other states such a purchase is legal and allowable.¹ And,

App. 54 (1873); *Duke's Case*, L. R. 1 Ch. D. 620 (1876). See also §§ 167–170, *supra*.

¹ *First Nat. Bank v. Salem, etc. Co.*, 39 Fed. Rep. 89 (1889). A corporation, unless prohibited by statute, may purchase its own stock. *New Eng. Trust Co. v. Abbott*, 162 Mass. 148 (1894). In Illinois, in *Chicago, etc. R. R. v. Marseilles*, 84 Ill. 145 (1876), the court said: "We entertain no doubt that a railroad company may, for legitimate purposes, purchase shares of stock which have been issued to individuals. Such is believed to have been the general custom of such bodies; nor have we known the power to have been questioned." A contract whereby the corporation agreed to take back the stock unless certain things were done within a certain time was sustained. *Chicago, etc. R. R. v. Marseilles*, 84 Ill. 643 (1877), where the court says, "the power of the directors of a company, when not prohibited by their charter, to purchase shares of stock of their company," is well recognized; *Clapp v. Peterson*, 104 Ill. 26 (1882); *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220 (1877); *Havemeyer v. Bordeaux Co.*, 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894); *Fraser v. Ritchie*, 8 Ill. App. 554 (1881), where a perfectly solvent concern sold certain property and took its own stock in payment; *Dupee v. Boston Water-Power Co.*, 114 Mass. 37 (1873), holding that a stockholder could not enjoin the purchase, the court saying: "In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers;" *Leland v. Hay-*

den, 102 Mass. 542 (1869); *Crease v. Babcock*, 51 Mass. 525, 557 (1846), holding that the stockholders are not liable for the deficiency caused by part of the stock being owned by the corporation. Where a corporation has power to reduce its capital stock, it may purchase from one of its stockholders his stock and give him in payment therefor his *pro rata* share of the assets of the corporation, the corporation being solvent. This amounts to a reduction of the capital stock, and a subsequent creditor of the corporation cannot complain. *Shoemaker v. Washburn, etc. Co.*, 73 N. W. Rep. 333 (Wis., 1897). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. *Solomon Co. v. Barber*, 49 Pac. Rep. 524 (Kan., 1897). In Pennsylvania, in *Eby v. Guest*, 94 Pa. St. 160 (1880), and *Early & Lane's Appeal*, 89 Pa. St. 411 (1879), it was held that "the assignment of the stock of a corporation to itself, as collateral security for a loan, divests the title of the assignor so far as to prevent a sale of it under a *fi. fa.* against the assignor." But in *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74 (1865), where a stockholder had accepted the benefit of the purchase and then objected to its legality, the court said: "The employment of corporate funds to speculate in the stock of the company to which the funds belong is not a practice to be encouraged; but the present plaintiff is not in position to censure the practice." He "should have sought an injunction against the company to restrain

indeed, if there is no statutory liability on stock, and if stockholders do not object, there is no reason why the *net profits* of a corporation should not be applied to purchasing its stock, in-

the purchase, or to cancel it if done before he had knowledge of it; or if he would bring an action at law, he should have declared for his share of the funds which he complains were misapplied in buying the shares." In Georgia, in the case of Hartridge v. Rockwell, R. M. Charl. 260 (1828), the court held: "If from the course of business or the state of things the capital of the bank cannot be usefully employed in loans, there can, I think, be no objection against the purchase of its own stock." The legislature, however, thought differently, and by the Penal Code of 1833 made such purchases a penal offense. In Robison v. Beall, 26 Ga. 17 (1858), the purchase was held to be authorized under a power to purchase goods, etc. See also, as supporting the doctrine, Farmers', etc. Bank v. Champlain Transp. Co., 18 Vt. 131, 139 (1846); Iowa Lumber Co. v. Foster, 49 Iowa, 25 (1878), under a power to purchase "property that may be deemed desirable in the transaction of its business." See 53 Pac Rep. 822.

A corporation which has agreed to pay a person a certain sum for his stock in the corporation, if he will transfer it to a corporate creditor in payment of the corporate debt, is liable for that sum to the stockholder. Snyder v. Tunitas Petrol. Co., 72 Cal. 194 (1887). "A corporation may, if it acts in good faith, buy and sell shares of its own stock." Republic L. Ins. Co. v. Swigert, 135 Ill. 150 (1890); First, etc. Bank v. Salem, etc. Co., 39 Fed. Rep. 89 (1889). An agreement of a corporation to accept its own stock in payment for land sold by it is not *per se* an *ultra vires* act. Thompson v. Moxey, 47 N. J. Eq. 538 (1890). A corporation may purchase shares of its own stock, subject to

the right of creditors to object thereto if the capital stock is impaired thereby. Blalock v. Kernersville Mfg. Co., 110 N. C. 99 (1892). A corporation may issue stock to an employee on an agreement to buy it back in case he is discharged. Yeaton v. Eagle, etc. Co., 4 Wash. St. 183. (1892). Where the majority stockholders cause the directors to purchase stock of them for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside. Woodroof v. Howes, 88 Cal. 184 (1891). A by-law allowing a stockholder to return his stock to the corporation at a fixed value is illegal. Vercoutere v. Golden State Land Co., 116 Cal. 410. (1897). Instead of subscribing for stock, a party may make a contract with a corporation to take the stock with the right to return it and receive back the purchase price within a certain time. Such a contract is legal, and the stock may be returned and the money recovered if corporate creditors' rights do not intervene. Vent v. Duluth, etc. Co., 64 Minn. 307. (1896). Where a corporation issues stock in payment for a patent-right, and agrees to take back the stock and pay the par value thereof at the end of five years if the purchaser so wishes, the purchaser may enforce the agreement. Browne v. St. Paul Plow Works, 62 Minn. 90 (1895). See also § 339, *infra*. Although a corporation has purchased its own stock, it cannot rescind the purchase and recover back the price unless it tenders back the stock. Bank of San Luis Obispo, etc. v. Wickersham, 99 Cal. 655 (1893). The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable

stead of being used for a dividend. The federal court has said: "It is a mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter prohibition or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto."¹ The cases which appear to uphold a contrary rule are found, upon close examination, to come within the exceptions given above.² All of the American courts coincide in the view that

him to purchase the stock. *Green v. Hedenberg*, 159 Ill. 489 (1896). A person who buys out and assumes the liabilities of a corporation cannot repudiate its note in payment for some of its own stock, he knowing of the transaction when he assumed the debts. *Miller v. Washington Southern R'y*, 11 Wash. 414 (1895). Stockholders cannot defeat their liability on stock by setting up that they subscribed in behalf of the corporation itself and on the secret agreement that they should not be held liable. *Barto v. Nix*, 15 Wash. 563 (1896). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. *Tuttle v. Batchelder, etc. Co.*, 49 N. E. Rep. 640 (Mass., 1898).

¹The court, however, enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but refused to appoint a receiver. *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646 (1895). In Ohio the early case of *Taylor v. Miami Exporting Co.*, 6 Ohio, 176 (1833), held that a bank may receive from the stockholders transfers of stock in payment of debts previously contracted by them. See also *State v. Franklin Bank*, 10 Ohio, 91, 97 (1840). But in *Coppin v. Green-*

lees, etc. Co., 38 Ohio St. 275 (1882), the court refused to enforce an executory contract for the sale to the corporation of its own stock. The proposed purchase was held to be invalid under the constitutional provision imposing a personal liability on all stockholders. But see *Morgan v. Lewis*, 46 Ohio St. 1 (1888). The directors are not liable to the vendor of the stock for the failure of the corporation to complete their purchase for it of its own stock. *Abeles v. Cochran*, 23 Kan. 405 (1879). *Quo warranto* does not lie against a corporation for purchasing its own stock. *State v. Minnesota, etc. Co.*, 40 Minn. 213 (1889).

²Thus, in *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60 (1877), the bank was insolvent when the stock was purchased by it. The purchase was declared illegal. In *Bent v. Hart*, 10 Mo. App. 143 (1881), the corporation did not purchase its own stock. The stock was purchased by another corporation, and the transaction was sustained. In *St. Louis, etc. Co. v. Hilbert*, 24 Mo. App. 338 (1887), the stock purchased by the corporation was not paid-up stock. In *State v. Oberlin Building Assoc.*, 35 Ohio St. 258 (1880), the peculiar purposes and articles of association of a building association governed the decision. In *Barton v. Port Jackson, etc. Co.*, 17 Barb. 397 (1854), the company mortgaged its road in order to raise money to buy the stock. Where a corpora-

a corporation may take shares of its own stock in payment of or security for antecedent debts due to the corporation.¹ A corporation may take its own stock by way of gift² or bequest.³

§ 312. The objection usually made to allowing a corporation to purchase its own stock is that thereby the corporate funds are expended and no property is received by the corporation, except the right to resell. In some cases, also, a statutory liability attached to the stock is thereby jeopardized. The latter objection is answered by the principle of law that the transferrer of stock to the corporation is liable on the subscription and statutory liability to the same extent as though no trans-

tion which has no profits on hand issues its bonds in payment for its stock, the party so receiving the bonds cannot enforce them, but on the contrary remains liable for the unpaid subscription price of the stock, it not having been properly issued as paid-up stock, and he not being a *bona fide* holder. *Hebberd v. Southwestern, etc. Co.*, 36 Atl. Rep. 122 (N. J., 1896). Where a corporation buys shares of its own stock from one of its stockholders, it may repudiate the transaction and defend a suit by the stockholder on a note given for the stock. The court said that such a purchase should not be to the advantage of a few favored stockholders, to the injury of the great body of them. *Price v. Pine Mountain, etc. Co.*, 32 S. W. Rep. 267 (Ky., 1895). A party who loans money to a corporation knowing that the money is to be used by the company to buy shares of its own capital stock cannot collect his debt, the act being *ultra vires*. *Adams, etc. Co. v. Deyette*, 8 S. D. 119 (1895). An insolvent corporation cannot purchase shares of its own stock. *Adams, etc. Co. v. Deyette*, 5 S. D. 418 (1894). Where a corporation is in process of dissolution the directors have no power to use the corporate funds to purchase shares of its stock. *Augsburg Land, etc. Co. v. Pepper*, 27 S. E. Rep. 807 (Va., 1897).

¹The leading case is *City Bank v. Bruce*, 17 N. Y. 507 (1858), where a corporation received \$133,000 of its own stock in payment of debts due the corporation, the court saying it is "not aware of any common-law principle which forbids it." See also *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84 (1831); *Chillicothe, etc. Bank v. Fox*, 3 Blatchf. 431 (1856); S. C., 5 Fed. Cas. 632, where the stock was taken in payment of a debt due the corporation. In *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418, 451 (1851), the debtor who had given stock to a corporation in payment of a debt was allowed to deny the amount of the debt and to take back the stock upon payment of the amount actually due. A company may receive its own stock in satisfaction of a debt where it is necessary in order to protect the corporation from loss. *Barto v. Nix*, 15 Wash. 563 (1896); 76 N.W. Rep. 253.

²*Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87 (1882), where its legality was assumed. A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires*. *Thomson v. Trustees*, [1895] 2 Ch. 454. See also § 46, ch. III, *supra*.

³*Rivanna Nav. Co. v. Dawsons*, 3 Gratt. (Va.) 19 (1846).

fer to the corporation had been made.¹ The former objection is merely a limit to the power of the corporation to purchase. In Illinois, the state where the right of the corporation to make such purchases is most clearly and decisively established, the collateral principle that such purchases are to be declared illegal and voidable at the instance of corporate creditors who are injured thereby is distinctly stated and rigidly applied.² If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside.³ The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock, or if the actual assets at that time are less than the capital stock, such purchase may be impeached and set aside, and the guilty corporate officers, as well as the vendor of the stock, may be rendered liable thereon

¹ See § 251, *supra*.

² *Clapp v. Peterson*, 104 Ill. 26 (1882); *Peterson v. Illinois Land, etc. Co.*, 6 Ill. App. 257 (1880). In *Crandall v. Lincoln*, 52 Conn. 73, 99, 100 (1884), where stock was bought for the corporation by a corporate agent, the latter was held liable to the receiver of the corporation for the money so expended. The court said: "The statute forbidding the company to make dividends payable from the stock, and to loan money upon a pledge of its stock, by necessary implication forbids the company from purchasing its stock. . . . As a rule, to which there are few, if any, exceptions, when a stockholder conveys his stock to the company and receives in return a portion of the capital, he holds the money so received subject to the superior equities of creditors." But the selling stockholder, not knowing that his vendee buys for the corporation, is not liable. *Johnson v. Laflin*, 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; *aff'd*, 103 U. S. 890.

³ *Currier v. Lebanon Slate Co.*, 56 N. H. 262 (1875); *Alexander v. Relfe*, 74 Mo. 495 (1881). A purchase by an insolvent bank of shares of its own

stock from one who had just resigned as vice-president is illegal, and he cannot collect a certificate of indebtedness given him therefor. *Re Columbian Bank*, 147 Pa. St. 422 (1892). So also of a sale by the president, even though he held the stock as executor of an estate. *Re Columbian Bank*, 147 Pa. St. 422 (1892). Where a manufacturing company, four months before it is adjudged insolvent and a receiver appointed, purchases shares of its own stock and gives its note in payment, such note cannot be enforced against the corporation, there being no proof that there were any net profits at the time of the transaction. *Hamor v. Taylor, etc. Co.*, 84 Fed. Rep. 392 (1897). Where a corporation is insolvent and a stockholder knows that fact, he cannot sell his stock to the corporation in exchange for corporate property, and he will be compelled by the court, in behalf of then existing creditors, to return the property. *Commercial Nat. Bank v. Burch*, 141 Ill. 519 (1892); *Butler, etc. Co. v. Robbins*, 151 Ill. 588 (1894); *Roan v. Winn*, 93 Mo. 503 (1887). See also cases in notes *supra*.

at the instance of a corporate creditor.¹ Subject to the above conditions, not even a dissenting stockholder can complain of the purchase by a corporation of shares of its own stock.²

¹ A stockholder who sells his stock to the corporation itself, the latter being insolvent, may be compelled to restore the consideration received by him. *Buck v. Ross*, 68 Conn. 29 (1896), quoting and approving of the text herein. A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the insolvent bank, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. *Bridgens v. Dollar Sav. Bank*, 66 Fed. Rep. 9 (1895). Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re Brockway, etc. Co.*, 89 Me. 121 (1896); *Fraser v. Ritchie*, 8 Ill. App. 554 (1881), holding that the right of the corporation to purchase its own stock is subject to certain restrictions, "one of which is that it shall not be done at such time and in such manner as to take away the security upon which the creditors of the corporation have the right to rely for the payment of their claims; or in other words, so as not to diminish the fund created for their benefit. Each case must therefore depend upon and be determined by its own facts and circumstances." See also *Gillet v. Moody*, 3 N. Y. 479 (1850).

Where directors and stockholders desire to sell the enterprise, and do so by paying for their stock out of the corporate funds, and then re-insuring all risks in another company, and turning over everything to the latter, a receiver of the company so sold out may hold a director liable for moneys so paid out. *Guild v. Parker*, 43 N. J. L. 430 (1881). A receiver of a corporation seeking to set aside a purchase of stock by the corporation itself must tender back the stock before suing to recover the money. *Pierson v. McCurdy*, 33 Hun, 520 (1884). In *Re Republic Ins. Co.*, 3 Biss. 452 (1873); S. C., 20 Fed. Cas. 544, where the insolvent corporation had, some three years previously, when the corporation was solvent, purchased stock of various stockholders and still held it, the court held that these old stockholders were not liable for the unpaid subscription price thereof. In *Farnsworth v. Robbins*, 36 Minn. 369 (1887), the receiver of an insolvent company recovered from a stockholder whose stock the company had purchased. A scheme whereby the corporation takes back the stock and issues certificates of indebtedness for it is invalid as against creditors. The latter are entitled to the assets in preference to the former. *Heggie v. People's, etc. Assoc.*, 107 N. C. 581 (1890). Although a company buys its own stock from a stockholder, subsequent creditors cannot complain. *Rollins v. Shaver, etc. Co.*, 80 Iowa, 380 (1890). Where a corporation uses its profits to buy its own stock, the remaining stockholders are not lia-

² *Dupee v. Boston Water-Power Co.*, 114 Mass. 37 (1873). See § 283 as to the power of a corporation to pur-

chase stock in order to reduce its capital stock.

§ 313. Frequently statutes are passed expressly prohibiting a corporation from purchasing shares of its own stock.¹ The national banks in this country are prohibited from so doing by the statutes of the federal government.² In New York, by

ble on the statutory liability attaching to the stock so purchased by the corporation. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 35 S. W. Rep. 337 (Tex., 1896). Even though the directors have sold preferred stock held by them to the corporation and taken its notes therefor when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. *Empire Hotel Co. v. Main*, 98 Ga. 176 (1896). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. *First Nat. Bank v. Peavey*, 75 Fed. Rep. 154 (1896).

¹ See Part VII, *infra*.

² U. S. Rev. Stat., § 5201. See *Johnson v. Laflin*, 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; *aff'd*, 103 U. S. 800, holding that, if a stockholder in good faith and without notice sells his stock to one who purchases for the bank, the sale is valid so far as he is concerned, and he is not liable thereon. See also *Bank v. Lanier*, 11 Wall. 369 (1870), holding that the bank cannot take its own stock in pledge. A national bank has no power to purchase its own stock except to prevent a loss on an existing debt. The bank may by a suit at law recover back the money paid for the stock without tendering the stock. *Burrows v. Niblack*, 84 Fed. Rep. 111 (1898).

When the president of a bank buys

its stock for the bank itself, taking title in his own name, he is liable as a stockholder. The purchase for the bank, however, is void. *Bundy v. Jackson*, 24 Fed. Rep. 628 (1885). Although a national bank must sell its stock taken in payment of a debt within six months, it may sell on credit, taking a note in payment and the stock as collateral. *Union Nat. Bank v. Hunt*, 76 Mo. 439 (1882). The question whether a note given by a bank was in payment of its own stock is not a question giving jurisdiction to the federal courts. *Chemical Bank v. City Bank*, 160 U. S. 646 (1896). Where a national bank receives its own stock in pledge at the time of making the loan, and sells the stock as collateral, on failure of the debtor to pay, the latter cannot complain that the statute has been violated. *National Bank of Xenia v. Stewart*, 107 U. S. 676 (1882). See also *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877); *Shoemaker v. National Mech. Bank*, 31 Md. 396 (1869); *O'Hare v. Second Nat. Bank*, 77 Pa. St. 96 (1874); *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424 (1869). Although a national bank is prohibited from taking its own stock as security, yet if it does so, the stock being taken in the name of the cashier, it may enforce the security. Only the government can object after the transaction has been completed. It is immaterial that the stock was transferred to the cashier individually and not "as cashier." *Walden Nat. Bank v. Birch*, 130 N. Y. 221 (1891). A transfer of the stock of a national bank to the bank in payment of a debt will not be set aside at the instance of the vendor

statute, certain corporations are prohibited from purchasing shares of their own capital stock.¹

§ 314. *The stock is not merged, and it may be sold by the corporation.*—When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged.² So long, however, as the corporation retains the ownership, the stock is lifeless, without rights or powers. It cannot be voted nor can it draw dividends, even though it is held in the name of a trustee for the benefit of the corporation.³ But at any time the corporation may resuscitate it by selling it and transferring it to the purchaser. Such sale may

as being in violation of the statute. *Chapin v. Merchants' Nat. Bank*, 14 N. Y. St. Rep. 272 (1888). A person who allows stock to stand in his name on the books of a national bank is liable on the statutory liability therefor, even though he held the stock as trustee for the bank itself. *Lewis v. Switz*, 74 Fed. Rep. 381 (1896). A national bank president and directors are not liable criminally for purchasing the stock of the bank for the bank itself. *United States v. Britton*, 107 U. S. 655 (1882); *United States v. Britton*, 108 U. S. 192 (1883).

¹See Part VII, *infra*. "The evident intention was to prohibit a division of the capital, or any portion of it, among the stockholders, by whatever instrumentality the powers of the corporation in doing the act might be exerted." *Gillet v. Moody*, 3 N. Y. 479, 487 (1850). See also *United States Trust Co. v. United States F. Ins. Co.*, 18 N. Y. 199, 226 (1858); *Tracy v. Talmage*, 14 N. Y. 162 (1856). But purchasers of the stock from a banking corporation that had purchased it in violation of the statute cannot complain. They cannot impeach their own title. *Re Reciprocity Bank*, 22 N. Y. 9, 17 (1860). Nor can the vendor of the stock to the bank claim that the sale was invalid. He is estopped. *United*

States Trust Co. v. Harris, 2 Bosw. 75, 91 (1857). See, in general, *Barton v. Port Jackson, etc. Co.*, 17 Barb. 397 (1854).

²*State v. Smith*, 48 Vt. 266 (1876); *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418, 451 (1851); *City Bank v. Bruce*, 17 N. Y. 507 (1858); *Chillcothe, etc. Bank v. Fox*, 3 Blatchf. 431 (1856); S. C., 5 Fed. Cas. 632, the court saying: "The stock was not extinguished or destroyed by the purchase thereof by the corporation;" *Vail v. Hamilton*, 85 N. Y. 453 (1881); *American R'y Frog Co. v. Haven*, 101 Mass. 398 (1869); *Commonwealth v. Boston, etc. R. R.*, 142 Mass. 146 (1886); *Ex parte Holmes*, 5 Cow. 426 (1826). The fact that a corporation buys its own stock does not necessarily reduce the capital stock, inasmuch as the stock so purchased may be re-issued. *Ralston v. Bank of California*, 112 Cal. 208 (1896); *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655 (1893). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. *Tulare, etc. Dist. v. Kaweah, etc. Co.*, 44 Pac. Rep. 663 (Cal., 1896). See also §§ 251, 282, *supra*.

³See ch. XXXVII, *infra*.

be made upon the authority of the corporate directors.¹ It may be sold at its market value, and need not be held for its par value, as is necessary in an original issue of stock.² The question whether a director may buy the stock from the corporation is considered elsewhere.³

§ 315. *Purchase by a corporation of stock in another corporation — Purchase by a railroad.*—It may be stated as a general rule that a corporation has no implied power to purchase shares of the capital stock of another corporation. This rule has often been applied to railroad corporations. It has been firmly settled by well-considered cases that one railroad company cannot purchase shares of stock in another railroad company.⁴ Especially is this the rule where the purchase is for the

¹ *Chillicothe Bank v. Fox*, 3 Blatchf. 431 (1856); S. C., 5 Fed. Cas. 632; *State v. Smith*, 48 Vt. 266 (1876). See also § 282, *supra*. Stockholders cannot enjoin the corporate officers from selling shares of its own stock which it has purchased. *Jefferson v. Burford*, 17 S. W. Rep. 855 (Ky., 1891).

² See §§ 29, 46, ch. III, *supra*. It may be issued by way of a stock dividend. See ch. XXXII, *infra*. In Louisiana the purchase by a corporation of its own stock cancels the stock until re-issued. If, however, in the re-issue the corporation gives away the stock, the parties receiving it are liable to subsequent corporate creditors. No formal contract of subscription is necessary, but the mere taking of the stock is sufficient to render them liable. *Belknap v. Adams*, 22 S. Rep. 382 (La., 1897).

³ See § 70, *supra*.

⁴ See § 64, *supra*. The most important case is *Central R. R. v. Collins*, 40 Ga. 582, 636 (1869), where a stockholder in one railroad obtained an injunction against its purchase, for purposes of consolidation, of stock in a rival and competing railroad. The court declared the purchase to be beyond the corporate powers and contrary to public policy, and says, "it is a general principle that a rail-

road company, without express authority given by the legislature to make the purchase, cannot purchase stock in another railroad company." See also *Angell & Ames, Corp.*, § 392. To same effect, *Hazlehurst v. Savannah, etc. R. R.*, 43 Ga. 13, 57 (1871), the court saying: "If one railroad may, at its option, buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter. This it cannot do by any implication. The power so to do must be clear." In *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 5 (1882), a similar injunction was granted. The court said (pp. 12-14): "The purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. . . . As a purchase with a view to extinguishing competition, the transaction is clearly *ultra vires*." To same effect, *Salomons v. Laing*, 12 Beav. 339, 353, 377 (1850); *Great Northern R'y v. Eastern Counties R'y*, 21 L. J. (Ch.) 887 (1851), where the object was to control the corporation. The court said it was an "attempt to carry into effect, without the intervention of parliament, what cannot lawfully be done except by parliament in the exercise of its discretion with reference to the in-

purpose of controlling the latter by means of corporate elections. The supreme court of the United States has said that "not only is the purchase of stock in another company beyond the power of a railroad corporation, in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void."¹ Where one railroad company ille-

terest of the public." See also *Maunsell v. Midland, etc. R'y*, 1 Hem. & M. 130 (1863), relative to the power of a railroad company to subscribe for the stock of another railroad. In *Central R. R. v. Pennsylvania R. R.*, 31 N. J. Eq. 475, 494 (1879), the defendant was enjoined from building another railroad by means of an independent corporation operated by "dummies." The court said: "A corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law, nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock." *Pearson v. Concord R. R.*, 62 N. H. 537 (1883), was a case where a railroad had purchased the controlling interest in the stock of a connecting railroad and was managing it in the interest of the former road. A suit by a stockholder of the defrauded road to enjoin such act was sustained. A foreign corporation cannot buy railroad stocks for the purpose of uniting competing lines, where domestic corporations are prohibited from so doing. *Clarke v. Central R. R.*, 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing the bill was dismissed. 62 Fed. Rep. 328 (1894).

A railroad has no power to buy the stock of another railroad. *Hamilton v. Savannah, etc. R'y*, 49 Fed. Rep. 412 (1892); *Mackintosh v. Flint, etc. R. R.*, 34 Fed. Rep. 582 (1888). See also *Green's Brice's Ultra Vires*, 91 (2d ed.).

Where a railroad company, in the name of one of its leased lines, contracted to purchase a majority of the stock of still another line, the vendor representing that the last line was unincumbered, the first-mentioned company may avoid the contract by proving that an incumbrance rested on the road to be sold. *Southwestern R. R. v. Papot*, 67 Ga. 675 (1881). A bondholder cannot object. *Matthews v. Murchison*, 15 Fed. Rep. 691 (1883). Where a railroad president uses its funds to purchase the stock of a construction company that has the stocks and bonds of a contemplated competing line which the construction company has agreed to build, the sale of the stock to such president may be attacked by parties who were defrauded by the party who sold the stock of the construction company. *Langdon v. Branch*, 37 Fed. Rep. 449 (1888). A railroad corporation which is advancing money to another corporation may take the bonds and stock of the latter as security. The West Virginia statutes do not prevent such act. *Taylor County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). A controlling stockholder in one railroad corporation may become the controlling stockholder in another railroad corporation. *Havemeyer v. Havemeyer*, 43 Super. Ct. (N. Y.) 506 (1878); 45 Super. Ct. (N. Y.) 464; *aff'd*, 86 N. Y. 618.

¹ *Louisville, etc. R. R. v. Kentucky*, 161 U. S. 677, 698 (1896), citing the above text.

gally buys from an individual the stock of another railroad company, and pays partly in cash and partly by note, and the note is paid by a sale of the stock at pledgee's sale, the former company cannot hold the individual liable for the money so paid. Both parties are guilty of the illegality, and the contract being executed will not be disturbed.¹ The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six years' statute of limitations is a bar to a stockholder's suit to hold them liable, no fraud being alleged.² In a few instances, particular corporations, by their charters, are given the power to purchase other railroad stocks, and in other instances general statutes to that effect prevail.³ Occasionally prohibitions against such purchases are placed in the constitution of a state.⁴

¹ *Cincinnati, etc. R. R. v. McKeen*, 64 Fed. Rep. 36 (1894).

² *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898).

³ See Part VII, *infra*; also *Baltimore v. Baltimore, etc. R. R.*, 21 Md. 50 (1863); *Columbus, etc. R'y v. Burke*, 19 Week. L. Bull. 27 (Ohio, 1887); *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), as to the Ohio statute. In *White v. Syracuse, etc. R. R.*, 14 Barb. 559 (1853), a general law allowing any New York railroad to *subscribe* to the stock of the Great Western Railroad, Canada West, was held constitutional and valid. See also *Matthews v. Murchison*, 17 Fed. Rep. 760 (1883), on the North Carolina act. As to the Kansas act allowing such purchases, see *Atchison, etc. R. R. v. Fletcher*, 35 Kan. 236 (1886); *Ryan v. Leavenworth, etc. R'y*, 21 Kan. 365 (1879); *Atchison, etc. R. R. v. Cochran*, 43 Kan. 225 (1890). In *Kimball v. Atchison, etc. R. R.*, 46 Fed. Rep. 888 (1891), the court held that the Atchison, Topeka, & Santa Fe Railroad Company had power under its charter to buy a majority of the stock of the St. Louis & San Francisco Railway, a partially competing line. Under the statutes of Pennsylvania it is legal for a railroad company to

own all the stock of a mining company which owns land, and such land does not escheat. *Commonwealth v. New York, etc. R. R.*, 132 Pa. St. 591; 139 Pa. St. 457 (1891). In New York, by statute, a railroad company may purchase shares of stock in another railroad company. *Oelbermann v. New York & Northern R. R.*, 77 Hun, 332 (1894).

⁴ See Part VII, *infra*. By the constitution of Pennsylvania any railroad corporation is forbidden to control any other railroad corporation owning or having under its control a parallel or competing line. Under this provision the Pennsylvania Railroad Company was enjoined from purchasing a majority of the stock of the South Pennsylvania Railroad Company. In this noted case (*Pennsylvania R. R. v. Commonwealth*, 7 Atl. Rep. 368—1886), the court said that the ownership of a majority of the stock gave "control" in the sense of that word as used in the constitution. Cf. *Pullman Palace Car Co. v. Missouri Pac. R. R.*, 11 Fed. Rep. 634 (1882); affirmed, 115 U. S. 587 (1885), construing the word "control" differently in a contract whereby the defendant was to use the plaintiff's cars over roads under the defendant's

Where a railroad company has power to purchase, lease, or consolidate with another railroad company, it may buy the stock of the latter company with a view to such consolidation, lease, or sale.¹

In some instances, where a railroad company buys a controlling interest in another railroad for the purpose of electing the board of directors of the latter, a minority stockholder in the latter company may enjoin the former from voting the stock so purchased.²

control. The supreme court of Pennsylvania, in *Pennsylvania R. R. v. Commonwealth*, 7 Atl. Rep. 374 (Pa., 1886), also sustained an injunction enjoining a corporation, a majority of whose stock was owned by the Pennsylvania Railroad Company, from purchasing a majority of the stock of a road competing with the Pennsylvania Railroad Company. The constitution of Georgia forbids and prevents one railroad from buying the stock and control of a competing railroad scheme, even though the railroad of the latter is not even commenced and there is no intention of building it. *Hamilton v. Savannah*, etc. R'y, 49 Fed. Rep. 412 (1892). This constitutional provision applies only to roads competing in the state. *Clarke v. Richmond*, etc. Co., 62 Fed. Rep. 328 (1894). Even though a railroad company owns stock in a coal company contrary to the statute, yet a person contracting with the coal company cannot raise that question. *Hill v. Rich Hill*, etc. Co., 119 Mo. 9 (1893).

¹ Where a railroad corporation has power to consolidate with another, it may purchase the stock of that other in contemplation of the consolidation. *Hill v. Nisbet*, 100 Ind. 341 (1884). A railroad corporation may purchase the stock of another railroad with a view to buying the railroad itself, where the sale of the railroad is authorized. *Dewey v. Toledo*, etc. R'y, 91 Mich. 351 (1892). Where a

railroad company has power to lease another company's road, it may buy all the stock of the latter instead of taking a lease. *Atchison*, etc. R. R. v. *Fletcher*, 35 Kan. 236, 247 (1886). A railroad corporation having the power to buy or consolidate with other railroads may buy a controlling interest in the stock of another railroad. *Wehrhane v. Nashville*, etc. R. R., 4 N. Y. St. Rep. 541 (1886). But where one company buys the stock of another with no declaration of purpose of leasing the road, although the power to lease exists, a stockholder may enjoin the purchase of stock. *Elkins v. Camden*, etc. R. R., 36 N. J. Eq. 5 (1882). See also § 317, *infra*.

² See § 615, ch. XXXVII, *infra*; *Milbank v. New York*, etc. R. R., 64 How. Pr. 20 (1882). Cf. *Great Western R'y v. Metropolitan R'y*, 32 L. J. (Ch.) 382 (1863). Where a railroad buys a controlling interest in the stock of a competing railroad, it and its officers and dummies will be enjoined from voting such stock at the instance of minority stockholders, it being clear that if allowed to control the latter corporation the former corporation can enhance its profits at the expense of the latter corporation, by diversion of traffic. *Memphis*, etc. R. R. v. *Woods*, 88 Ala. 630 (1889). One railroad corporation has no power to acquire the bonds of another railroad corporation in order to control the elections of the latter, such bonds having a voting power. *State v. Mc-*

A railroad company owning all the stock and bonds of another company does not own the property of the latter. It cannot sue on a cause of action belonging to the latter.¹

§ 316. *Purchases of stock by banks, and pledges to banks.*—A banking corporation has at common law no power to purchase or invest in the stock of another corporation, whether that other corporation be itself a bank or of a different business.² The bank is organized for the purpose of receiving de-

Daniel, 22 Ohio St. 354, 368 (1872). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock, and that such purchaser is diverting the traffic to its own line and is wrecking the corporation which it controls. *Alexander v. Searcy*, 81 Ga. 536 (1889). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or, in lieu of all this, for a forfeiture of the charter, is not demurrable. *State v. Port Royal*, etc. R'y, 45 S. C. 470 (1895). Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held contrary to the statutes and constitution of the state by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce and purchased the stock for interstate-commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and gives it a right to own such stock. *State v. Port Royal*, etc. R'y, 56 Fed. Rep. 333 (1893).

¹ *Fitzgerald v. Missouri Pac. R'y*, 45 Fed. Rep. 812 (1891). Although one

railroad company owns a majority of the stock of another railroad company, yet the identity of the two is separate as regards being parties to suits. *Jessup v. Illinois Cent. R. R.*, 36 Fed. Rep. 735 (1888). A corporation which owns a majority of the stock of another corporation, and buys goods of it, is not bound to see that the latter turns the funds over to a party who owned the goods and consigned them for sale. *Wheeler v. New Haven Wire Co.*, 16 Atl. Rep. 393 (Conn., 1889). See on this subject § 6, *supra*, and §§ 663, 664, 709, *infra*.

² Approved in *California Bank v. Kennedy*, 167 U. S. 362, 369 (1897); *Talmage v. Pell*, 7 N. Y. 328, 347 (1852); *Nassau Bank v. Jones*, 95 N. Y. 115, 120 (1884); *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 128 (1875), where, in reference to national banks, the court said: "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power." *Tracy v. Talmage*, 14 N. Y. 162 (1856); *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869); *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43 (1877). Where a bank desires to subscribe to the stock of a trust company, but cannot legally do so, and its directors give their note in payment, they are liable on the note to the receiver of the trust company. *Adams v. Kennedy*, 34 Atl. Rep. 659 (Pa., 1896). A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take

posits and loaning money, not for the purpose of dealing in stocks. Any attempt to engage in such transaction is a violation of its charter rights and of its duty towards the stockholders and the public. Thus, where a national bank invests its money in the stock of a savings bank, the investment is *ultra vires*, even though the savings bank becomes insolvent. The national bank is not liable on the statutory liability attached to such savings bank stock, even though the national bank received dividends on the stock.¹ Such is the decision of the supreme court of the United States, notwithstanding some decisions to the contrary.²

A pledge of stock to a bank as collateral security for a loan made by the bank at the time is of course legal. Such a pledge of stock is valid and may be enforced.³ So also as regards a

stock in payment of a debt. *Bank of Commerce v. Hart*, 37 Neb. 197 (1893).

¹ *California Bank v. Kennedy*, 167 U. S. 362 (1897), rev'g *Kennedy v. California Sav. Bank*, 101 Cal. 495. One national bank has no power to purchase stock in another national bank, and if such purchase is made in the name of a person who gets the money from the first-named bank in order to pay for the stock and gives his note to such bank for the money, he is liable to the receiver of the first-named bank on such note. *Tillinghast v. Carr*, 82 Fed. Rep. 298 (1897).

² A national bank which has purchased from a third party shares of stock in another national bank as an investment, and which appears on the books of the latter bank as a stockholder, is estopped, after the latter's failure, to deny liability to an assessment on the stock on the ground that its purchase thereof was *ultra vires*. *First Nat. Bank v. Hawkins*, 79 Fed. Rep. 51 (1897). A state bank may be held liable on the statutory liability on national-bank stock which the former has purchased, even though the purchase is *ultra vires*. *Citizens' State Bank v. Hawkins*, 71 Fed. Rep. 369 (1896). So also as to

an insurance company holding such stock. *Cooper Ins. Co. v. Hawkins*, 71 Fed. Rep. 372 (1896). The case of *First Nat. Bank v. Hawkins*, 82 Fed. Rep. 301 (1897), holds that the case of *Bank v. Kennedy*, 167 U. S. 362 (1897), does not apply to a case where a national bank is a stockholder in another national bank. Where the cashier uses the bank's funds to buy stock in another bank, the court will hold that such stock belongs to the first-mentioned bank except as against *bona fide* purchasers of such stock. *Tecumseh, etc. Bank v. Russell*, 69 N. W. Rep. 763 (Neb., 1897). Where a bank buys wall paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. Rep. 85 (1896). A bank may buy the stock of another bank under the express power of the former to discount securities, and as a stockholder is liable on the stock. *Latimer v. Citizens' State Bank*, 71 N. W. Rep. 225 (Iowa, 1897). See § 252.

³ *Royal Bank of India's Case*, L. R. 4 Ch. App. 252 (1869). "Making ad-

pledge of stock to a bank to secure a debt previously contracted. Its legality is unquestioned, and is as free from objections as a pledge made contemporaneously with the loan.¹

§ 317. *Purchases of stock by insurance, manufacturing, and other companies.*—An insurance company has no power or legal right to subscribe for stock in a savings bank and building association,² nor to purchase stock in another insurance company.³ It is difficult to state any rule as regards the right of a manufacturing or trading corporation to purchase shares of the capital stock of another corporation. It has been held that neither a note-selling company⁴ nor a lumber company⁵ has power to invest in the shares of a bank, nor a steamship company to subscribe for stock in a dry-dock company.⁶ On

vances upon shares in public companies is within the ordinary course of the dealing of bankers." The stock pledged was stock in another bank. To same effect, *Re Barned's Banking Co.*, L. R. 3 Ch. App. 105 (1867); *Shoemaker v. National Mech. Bank*, 1 Hughes (C. Ct. Md.), 101 (1869); S. C., 21 Fed. Cas. 1331, as applicable to national banks; also *National Bank v. Case*, 99 U. S. 628 (1878). Such a pledge to a national bank is not prohibited by the statutory provision that the bank shall not take a real-estate mortgage as security, although the property of the corporation whose stock was pledged consisted only of real estate. *Baldwin v. Canfield*, 26 Minn. 43 (1879). See also *Sistare v. Best*, 88 N. Y. 537 (1882). *Contra*, *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (1881), where the legality of the pledge was denied, and the right of the pledgee to have the stock registered in its name not granted. On a reorganization it is legal for a bank owning some of the bonds to take part in such organization and accept stock in the new company. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337 (Ky., 1890).

¹ *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 128 (1875).

² *Mechanics', etc. Assoc. v. Meriden Agency Co.*, 24 Conn. 159 (1855), holding the insurance company not liable on the stock. An insurance company cannot invest in the stock of a bank. *State v. Butler*, 86 Tenn. 614 (1888). Although the statute exempts capital "invested in property which is otherwise taxed as property," yet an insurance company cannot claim any exemption because it owns stock in a bank, inasmuch as it had no power to subscribe for such stock. *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1 (1892).

³ *Ex parte British Nation, etc. Assoc.*, L. R. 8 Ch. D. 679 (1878), the court refusing to hold the former liable on a winding up; *Berry v. Yates*, 24 Barb. 199 (1857); *Pierson v. McCurdy*, 33 Hun, 520 (1884).

⁴ *Joint-stock Discount Co. v. Brown*, L. R. 8 Eq. 381 (1869).

⁵ *Sumner v. Marcy*, 3 Woodb. & M. 105 (1847); S. C., 23 Fed. Cas. 384.

⁶ *New Orleans, etc. Co. v. Ocean Dry-dock Co.*, 28 La. Ann. 173 (1876). Although a corporation purchases stock in another corporation contrary to statute, yet a *bona fide* holder of a note given in payment therefor may collect the note. *Wright v. Pipe Line Co.*, 101 Pa. St. 201 (1882).

the other hand, it has been held that a steamboat company may purchase stock in another rival line.¹ It is clearly legal for a manufacturing corporation to take the stock of another in payment of a debt.² A manufacturing corporation has no implied power to buy the stock of another manufacturing corporation for the purpose of holding the stock permanently.³

A land and lumber company having power to consolidate

¹Booth v. Robinson, 55 Md. 419 (1880). This decision goes to the extreme length in allowing one corporation to invest in the stock of another. A manufacturing corporation is not presumed to be incapable of purchasing stock in another corporation. Evans v. Bailey, 66 Cal. 112 (1884).

²Howe v. Boston Carpet Co., 82 Mass. 493 (1860). Where an iron company sells iron to a railway company, to be paid for in stock of the latter, the contract is void, and the iron company cannot, it seems, even recover the value of the goods delivered. Valley R'y v. Lake Erie Iron Co., 46 Ohio St. 44 (1888). Where one telegraph corporation holds the bonds of another and exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage on the property of the second corporation. Boston, etc. Co. v. Bankers', etc. Co., 36 Fed. Rep. 288 (1888). This case was affirmed *sub nom.* United Lines Tel. Co. v. Boston, etc. Co., 147 U. S. 431. The court said, in regard to this method of issuing the stocks and bonds, "it violated no principle of law, and no rule of good morals." In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to

have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. A corporation dealing in jewelry may sell its goods and take in payment stock in a park company. White v. Marquardt, 70 N. W. Rep. 193 (Iowa, 1897). A corporation having power to buy and hold securities may take stock in another company as collateral security. Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa, 147 (1895).

³Byrne v. Schuyler, etc. Co., 65 Conn. 336 (1895). Where the directors of a failing linen manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. Pinkus v. Minneapolis Linen Mills, 65 Minn. 40 (1896). A member of a mercantile firm cannot bind the firm by a subscription to the capital stock of a milling corporation. Patty v. Hillsboro, etc. Co., 4 Tex. Civ. App. 224 (1893). A furniture manufacturing company is not liable on a statutory liability on stock which it has subscribed and paid for in a hotel company. Knowles v. Sandercock, 107 Cal. 629 (1895). A lien of a corporation on stock for debts due it from its stockholders does not attach to stock purchased by another corporation, the latter

with a railroad company may own the stock and guarantee the bonds and preferred stock of such railroad company, the railroad of which is beneficial to the land company in its mining, manufacturing, and lumbering business.¹ One building association has no power to accept stock of another building association in payment for stock of the former.² A corporation formed to manufacture and sell gas has no power to buy shares of stock in other gas companies.³

A steel-spring company may use its surplus earnings to purchase shares of stock in an iron and steel company for the purpose of purchasing steel cheaply from the latter company, especially where there is a combination which has put up the price of steel.⁴

Where a corporation owns stock in another corporation and sells it and takes a note in payment, it is no defense to a suit on the note to set up the *ultra vires* of the above act.⁵

having no power to purchase. *Lanier Lumber Co. v. Rees*, 103 Ala. 622 (1894).

¹ *Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894), holding also that it is not necessary that an actual consolidation be made (aff'g, on this point, *Tod v. Kentucky, etc. Co.*, 57 Fed. Rep. 47). If the guaranty is within the power of the company, and no stockholder objects, it is not necessary to show that it was beneficial to the stockholders, nor to show any special consideration, other than the money paid for the securities having the guaranty. *Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894). A land company may purchase the stock of a railroad company when the power to do so is expressly stated in a special charter of the former company. *Tod v. Kentucky, etc. Co.*, 57 Fed. Rep. 47 (1893). A corporation organized to buy, improve, and sell a certain piece of land has no power to subscribe for stock in a manufacturing corporation. *Pauly v. Coronado Beach Co.*, 56 Fed. Rep. 428 (1893).

² *German-American, etc. Assoc. v. Droge*, 14 Ind. App. 691 (1895).

³ *People v. Chicago Gas T. Co.*, 130 Ill. 268 (1889).

⁴ *Layng v. A. French Spring Co.*, 149 Pa. St. 308 (1892).

⁵ *Holmes, etc. Co. v. Holmes, etc. Co.*, 53 Hun, 52 (1889); aff'd, 127 N. Y. 252. Even though a corporation has no power to purchase stocks, yet if stocks are sold to it in payment for its own stock, the purchase is legal as against everybody excepting the state, and especially as against parties who participated in the act. *Burden v. Burden*, 8 N. Y. App. Div. 160 (1896). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. *Bear River, etc. Co. v. Hanley*, 50 Pac. Rep. 611 (Utah, 1897). Where a gas company buys the stock of an electric light company and gives a

A trust company may have power to hold as trustee and vote the majority of the stock of a railroad system.¹

One company may be enjoined from voting stock in a rival corporation where such ownership of stock is illegal and controls the second corporation, and such control will be inequitably used.²

Where the statutes of a state authorize incorporation for any legal purpose, incorporation can be had for buying and selling shares of stock in other corporations.³

Religious and charitable and other corporations, not for profit, have, it seems, implied power to invest their funds in stock of other corporations.⁴

mortgage upon its property as security for the payment of the purchase price, and this mortgage passes into the hands of another person, such last-named person cannot rescind the transaction on the ground that it was *ultra vires*. *Woodcock v. First Nat. Bank*, 71 N. W. Rep. 477 (Mich., 1897). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. *Cullen v. Coal Creek, etc. Co.*, 42 S. W. Rep. 693 (Tenn., 1897).

¹ *Clarke v. Richmond, etc. Co.*, 62 Fed. Rep. 328 (1894), dismissing the bill involved in *Clarke v. Central R. R. etc. Co.*, 50 Fed. Rep. 338 (1892).

² See § 315, *supra*; also § 615, ch. XXXVII. Where a consolidation is effected by one company buying all the stock of another company, and just before the transaction is completed the company whose stock is thus sold issues a dividend of interest-bearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. *Bailey v. Citizens' Gas, etc. Co.*, 27 N. J. Eq. 196 (1876).

³ A stockholder in the corporation cannot enjoin it from purchasing

stock in accordance with its articles of incorporation. *Willoughby v. Chicago, etc. Co.*, 50 N. J. Eq. 656 (1892). It is not for a creditor of the vendor of stock to raise the question whether the vendee — a corporation — had power to purchase the stock. *Kern v. Day*, 45 La. Ann. 71 (1893). A corporation organized to deal in the stock of a stock-yard corporation and hold personal and real estate may buy competing stock yards; also buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stock-yard company, and to bind stock-yard men not to erect competing yards for a specified term of years, within a certain territory; and may sell any or all of the above property and right to the first-named company. *Ellerman v. Chicago, etc. Co.*, 49 N. J. Eq. 217 (1891).

⁴ *Pearson v. Concord R. R.*, 62 N. H. 537 (1883). In this case the court said (p. 549): "Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for

There has been some controversy whether one corporation could sell all its property to another corporation, taking pay in stock of the latter, and dividing such stock among the shareholders of the selling corporation. The weight of authority holds that such a transaction is legal if all the stockholders assent, but may be prevented by any stockholder of the former corporation.¹ Where a corporation owns stock in the name of a trustee for the corporation, it is obliged to indemnify such trustee for calls paid by him.² The stock owned by a corporation may be sold by its general business agent and financial manager and representative, he having apparent power to sell, and the governing body not objecting.³ The plan of having one "parent" company own a majority of the stock of many subsidiary companies is legal where the parent company has

the preservation of the funds with which such institutions are endowed, and to render their funds productive." To same effect, *Hodges v. New England Screw Co.*, 1 R. I. 312 (1850).

¹ See § 671, *infra*. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. *Elyton Land Co. v. Dowdell*, 113 Ala. 177 (1896). In *McCutcheon v. Merz Capsule Co.*, 71 Fed. Rep. 787 (1896), several corporations agreed to turn over their property to one corporation and to take stock and bonds in payment, the price to be thereafter fixed by appraisers. After the stock was issued one of the companies withdrew, and the court held that the company withdrawing could file a bill to cancel the agreement on the ground that the company had no power to hold stock in other corporations. A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company—a combination company—in exchange for or payment

of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it. *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. Rep. 414 (1895).

² *Goodson's Claim*, 28 W. R. 760 (1880). Where one company takes shares of stock in another company and puts such stock in the name of its treasurer and president as "trustees for the stockholders of the A. Co.," and the treasurer afterwards sells the stock and converts the money to his own use, he may be compelled to account for the same. *Murray v. Aiken, etc. Co.*, 37 S. C. 468 (1892).

³ *Walker v. Detroit Transit R'y*, 47 Mich. 338 (1882). See also *Sistare v. Best*, 88 N. Y. 527 (1882). That the corporate treasurer may sell the stock, see *Holden v. Metropolitan Nat. Bank*, 138 Mass. 48 (1884). Where an agent of a corporation purchases, without authority, stock in another company, and sells one of the shares to a person in order to enable the latter to qualify as a director in such company, the person receiving the one share is protected in his title, and the first-named corporation can-

power to own stocks such as those of the subsidiary companies.¹ Where one corporation owns all the stock of another corporation, the court may ignore the existence of the latter.²

§ 318. *Infants as purchasers of stock.*—An infant is incompetent to purchase shares of stock. Most cases of this class arise upon a winding up of the corporation, when the infant is placed upon the list of contributories, and, in defense, infancy is set up.³ An infant's purchase or sale of stock is voidable and not void.⁴ This seems to be the rule finally arrived at by the English courts, after some hesitation and difference of opinion. The transfer is similar to a deed, and passes an interest to the infant even when coupled with a liability, if it be for his benefit to accept it.⁵ Consequently an infant, upon coming of age, is bound to elect whether he will affirm or disaffirm a purchase of stock made by him while yet an infant.⁶ He may disaffirm while still an infant, and is then not liable on calls.⁷ The plea

not compel him to give it up, even though the agent had no power to sell, the purchaser having purchased in good faith. Hence his acts as a director are valid. *Scarlett v. Ward*, 52 N. J. Eq. 197 (1893).

¹ For a careful and clear statement of the plan of having a parent company own stock in subsidiary companies, see *People v. American Bell Tel. Co.*, 117 N. Y. 241, 244, 255 (1889). A land company has no power to sell property to a minor or branch company and take stock in payment, but in order to set it aside all parties interested must be made parties to the suit. *Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894). Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other

coupons are paid. *Phinizy v. Augusta, etc. R. R.*, 62 Fed. Rep. 771 (1894).

² See § 6, *supra*.

³ See §§ 67, 250, *supra*.

⁴ *Lumsden's Case*, L. R. 4 Ch. App. 31 (1868); *Smith v. Nashville, etc. R. R.*, 91 Tenn. 221 (1892).

⁵ *Lumsden's Case*, L. R. 4 Ch. App. 31 (1868).

⁶ Where, however, the corporation becomes insolvent just before or just after the infant comes of age, he need not affirm or disaffirm, but may await the action of the corporation; but where he is silent for two years after coming of age, and corporate insolvency then occurs, he is bound. *Mitchell's Case*, L. R. 9 Eq. 363 (1870). For other cases of ratification, see references in §§ 67, 250, *supra*.

⁷ *Newry, etc. Ry v. Coombe*, 3 Exch. 565, 578 (1849), where it was said: "He became a shareholder by contract during infancy, and during infancy he disaffirmed the contract; therefore, in my opinion, he ceased to be a shareholder liable to be sued for calls."

of infancy is a good defense,¹ but the plea must allege a disaffirmation within a reasonable time after becoming of age.² Where a stockholder sells his stock through a stock-exchange jobber, and the sale is made to an infant, the jobber is liable to the vendor for calls paid by him in consequence of such infancy.³ An infant's sale of stock, even by a transfer of the certificate, is not binding on him.⁴

§ 319. *Married women as purchasers, owners, or vendors of stock.*—At common law a married woman's rights as regards shares of stock were the same as prevailed with reference to other personal property purchased or owned by her. She had no material rights. Modern statutes have, however, completely changed her rights of property and of contract. These statutes are so different in form and effect that, for the purpose of ascertaining the status of a married woman as a stockholder, it is necessary to consult the statute law in the state of her domicile, and also in the state of the corporation itself.⁵ In Eng-

¹ *Birkenhead, etc. R'y v. Pilcher*, 5 Exch. 24 (1850).

² *Dublin, etc. R'y v. Black*, 8 Exch. 181 (1852).

³ *Nickalls v. Merry*, L. R. 7 H. L. 530 (1875).

⁴ *Smith v. Baker*, 42 Hun, 504 (1886).

⁵ As to the conflict of laws on this subject, see § 12, *supra*. In *Hill v. Pine River Bank*, 45 N. H. 300 (1864), the transfer by a married woman was in accordance with the laws of the state where she lived and also the state where the corporation was organized. *Dow v. Gould, etc. Co.*, 31 Cal. 629 (1867), holds that in California a gift of stock from husband to wife is valid, and that, after such gift, he could not sell and transfer it as his own. *Leitch v. Wells*, 48 N. Y. 585 (1872). The case of *Stanwood v. Stanwood*, 17 Mass. 57 (1820), holds that where the husband does not have the stock transferred to himself on the corporate books, but declares it to be his wife's stock, there is no reduction of it to his possession. See also *Wall v. Tomlinson*, 16 Ves. Jr. 413 (1810), to the effect that a

transfer of the wife's stock to the husband as trustee is not a reduction to possession; also, *Arnold v. Ruggles*, 1 R. I. 165 (1837); *Wildman v. Wildman*, 9 Ves. Jr. 174 (1803), and *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373 (1849), to the effect that only a registry will reduce the wife's stock to the possession of the husband. In Pennsylvania it has been held that assent by the husband to the assignment by the wife of a certificate of stock owned by her, sufficient to give good title to a holder for value of the certificate, is shown by the fact that not only was her signature to the assignment, and the irrevocable power of attorney executed in connection with it, witnessed by him, but that certain blank spaces in the instrument were filled out in his handwriting. *Souder v. Columbia Nat. Bank*, 156 Pa. St. 374 (1893). See also § 538, *infra*. The wife's stock, standing in her name at the time of and after marriage, is not subject to her husband's debts. *Cockrane v. Chambers*, Ambl. 79, n. (1825). In Connecticut it is held that the wife is

land the severity of the common law has been but partially modified by statute.¹

§ 320. *Competency of miscellaneous parties — Joint operation.*— A sale of stock by a person *non compos mentis* is void. The corporation is bound absolutely to know of the lunacy of

not liable in assumpsit to her husband's creditors, to whom she has pledged her stock, although she subsequently pledges it to another. An express promise to pay on her part is necessary. *Platt v. Hawkins*, 43 Conn. 139 (1879). A wife who allows stock bought with her money to stand for several years in her husband's name, in order to give him credit, is estopped from asserting her ownership as against his creditors. *Hamlen v. Bennett*, 52 N. J. Eq. 70 (1893). Although the husband is in possession of a certificate of stock running to his wife and transferred in blank by her, yet he may deliver the same in payment of his personal debt. The purchaser may be a *bona fide* purchaser. *McManus v. Laughlin*, 40 Atl. Rep. 902 (Pa., 1898). *Curtis v. Steever*, 36 N. J. L. 304 (1873), clearly and properly holds that the wife's stock, held by her as her separate estate, is not subject to her husband's debts. See also *Cornell's Appeal*, 114 Pa. St. 153 (1886), and §§ 66, 250, 308, *supra*; *Vanderheyden v. Mallory*, 1 N. Y. 452 (1848); *Voorhees v. Bone-steel*, 16 Wall. 16 (1872). A certificate issued to the husband as trustee of the wife constitutes her separate estate, where he pays the dividends to her. In Kentucky a resident married woman's power of attorney to convey stock is void. *Bank of Louisville v. Gray*, 84 Ky. 565 (1886). Taking out a certificate in his own name by the husband reduces his wife's stock to his possession, and it passes by his will, even though he made a memorandum to the effect that he held it in trust for her. *Cummings v. Cummings*, 143 Mass. 340 (1887).

Where a husband uses his wife's money to purchase stock and takes title in his own name, but considers himself trustee for her, a creditor of the husband, who at the time of incurring the debt knew that the latter held the stock for his wife, cannot subject it to the payment of the debt. *Porter v. Bank of Rutland*, 19 Vt. 410 (1847). Although a corporation errs in allowing a wife to transfer her stock to her husband, yet the statute of limitations runs against her right of action from the time of the transfer. *Chase v. Hibernia Nat. Bank*, 44 La. Ann. 69 (1891). In Kentucky, by statute, a wife's bank stock goes to her heirs, and not to her husband, upon her decease. *Kent v. Deposit Bank*, 91 Ky. 70 (1890). Possession by the husband, as executor, of stock of his wife is not a reduction to possession. *Sowles v. Witters*, 39 Fed. Rep. 403 (1889). A person taking stock from a person in whose name it stands cannot hold the same as against the latter's wife, where the stock belonged to her separate estate and was so known to be by the person taking it. *Stickney v. Adler*, 91 Ala. 198 (1890). A married woman may give away or pledge her stock. *Walker v. Joseph, etc. Co.*, 47 N. J. Eq. 342 (1890). Where the wife authorizes her husband to sell her stock and use the proceeds in his business, he cannot sell the stock and assign the proceeds to another person. The latter cannot collect such proceeds. *Deming v. Bailey*, 2 Rob. (N. Y.) 1 (1864).

¹ By 33 & 34 Vict., ch. 93, § 4, married women may purchase or take paid-up stock, or stock upon which

a transferrer, even though it allows a registry on his ordinary signature and transfer.¹ An assignee in bankruptcy or for the benefit of creditors takes only the interest and equitable rights of his assignor. A previous unrecorded transfer of the insolvent's stock is protected.² A partner may accept stock as collateral security for a loan from the firm,³ and may sell and transfer partnership stock.⁴

there can be no liability; but if taken by means of moneys of her husband without his consent, he may apply to the court and have it turned over to himself. Previous to this act the corporation might refuse to register her as a stockholder, but now the corporation must accept her the same as any other applicant for registry. *Regina v. Carnatic R'y*, 42 L. J. (Q. B.) 169 (1873). Under this act she may transfer her stock only after it has been formally set aside by statutory authority as her separate property. *Howard v. Bank of England*, L. R. 19 Eq. 295 (1875). Where the corporation has allowed a transfer by a married woman, it cannot cancel the registry. *Ward v. Southeastern R'y*, 2 El. & El. 812 (1860).

¹ *Chew v. Bank of Baltimore*, 14 Md. 299 (1859). A sale of stock is not easily set aside on the ground of mental incapacity on the part of the vendor. *Perry v. Pearson*, 135 Ill. 218 (1890). Fraudulent representations made to a person of feeble mind were held sufficient for a cancellation in *De Frees v. Carr*, 8 Utah, 488 (1893).

² *Dickinson v. Central Nat. Bank*, 129 Mass. 279 (1880); *Purchase v. New York Exch. Bank*, 3 Rob. (N. Y.) 164 (1865). *Contra*, *Shipman v. Aetna Ins. Co.*, 29 Conn. 245 (1860), where the previous transferee delayed unreasonably in claiming ownership of the stock.

³ *Weikersheim's Case*, L. R. 8 Ch. App. 831 (1873).

⁴ *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476 (1813). *Cf.* *Sargent*

v. Franklin Ins. Co., 25 Mass. 90 (1829). Compare also *Comstock v. Buchanan*, 57 Barb. 127 (1864), where the stock stood in both partners' names. Stock may belong to a partnership, although standing in the individual names of the partners in order to make them stockholders. *Fairfield v. Phillips*, 83 Iowa, 571 (1891). Where one of several associates engaged in the common enterprise of building railroads, in many of which he owned stocks, bonds, etc., dies, and his executor, with the assistance of experts, etc., makes a settlement with the other associates, such settlement is binding although such other associates did not impart all the knowledge or information they might have given. The subsequent rise in value of some of the securities is immaterial. *Colton v. Stanford*, 82 Cal. 351 (1890). Where stock is issued to two persons in their individual names, one of them cannot sell and transfer it, even though it was acquired in the partnership law business. The law is different as to a partner in a trading copartnership. *Moynahan v. Prentiss*, 51 Pac. Rep. 94 (Colo., 1897). Where a firm contracts to sell stock, and then one of the members of the firm dies, a tender of certificates standing in the names of the individual members of the firm, and not signed in blank, is not a sufficient tender. *Nicholls v. Reid*, 109 Cal. 630 (1895). Where a person holds land for himself and a partner, and transfers the same to a corporation for stock, and conceals all the facts from his partner, the latter may recover

A director of the corporation itself may buy and sell its stock like any other individual. The information which he has of the affairs of the corporation, whereby he is enabled to buy or sell at an advantage over the person with whom he deals, does not affect the validity of the transaction. He is entitled to the benefit of his facilities for information. There is no confidential relation between him and a stockholder, so far as a sale of the stock between them is concerned; and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud.¹

It is illegal for the directors to issue to themselves, in exclusion of others, such part of the original or increased capital

the value of his share of the stock, and the measure of the value is the highest value between the day of receiving the stock and the day when the plaintiff received notice thereof. *Morris v. Wood*, 35 S. W. Rep. 1013 (Tenn., 1896).

¹ *Tippicanoe County v. Reynolds*, 44 Ind. 509 (1873); *Carpenter v. Danforth*, 52 Barb. 581 (1868). This case was disapproved by the commentator to Story's Eq. Jur. (12th ed.) 229b, note, but the disapproval is omitted in the 13th ed. See also *Grant v. Attrill*, 11 Fed. Rep. 469 (1882), where the sale was induced by threat of assessments. See also *Johnson v. Laffin*, 5 Dill. 65, 83 (1878); S. C., 13 Fed. Cas. 758, 765; aff'd, 103 U. S. 800 (1880); *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108 (1874); *Gilbert's Case*, L. R. 5 Ch. App. 559 (1870); *Alexander v. Rollins*, 14 Mo. App. 109 (1883); aff'd, 84 Mo. 657; § 350, *infra*. In New York, by statute, a director is prohibited from selling stock "short." Laws 1892, ch. 692. Where the president of a company advises a stockholder to sell his stock at a certain price to a certain person, and the sale is made, the president is liable for the difference between that price and the market price, where the person purchased as the secret agent of the president.

Fisher v. Budlong, 10 R. L. 525 (1873). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. *Crowell v. Jackson*, 53 N. J. L. 656 (1891); *Haarstick v. Fox*, 9 Utah, 110 (1893). Where the president sells stock for \$120 per share after he has indorsed a false statement of the company's affairs, the stock being really worth but \$70 per share, the vendee may have the sale rescinded. *Prewitt v. Trimble*, 92 Ky. 176 (1891). It would be "inequitable to permit the directors of a corporation to so manage its business, or to so deal with its property, as to lessen the value of its stock for the purpose of purchasing such stock for themselves at a low figure." But this relation does not exist between one director and another director. *Perry v. Pearson*, 135 Ill. 218 (1890). The vendor of stock to the secretary of the company cannot rescind on the ground of fraud, the secretary having, at the time of the sale, given all the information which he had concerning the company. No confidential or fiduciary relation exists between such parties. *Krumbhaar v. Griffiths*, 151 Pa. St. 223 (1892).

stock as has not been already issued, the issue being for the purpose of controlling an election and making a profit.¹

A joint owner of stock cannot transfer the interest of the other joint owner where the stock is registered in the name of both.² On the death of one, the survivor takes title to the whole stock.³

Where stock is purchased by one person in his own name by due authority for himself and another, the latter is a part owner, and has rights and liabilities as such.⁴ The statute of

¹ See § 70, *supra*.

² *Standing v. Bowring*, L. R. 27 Ch. D. 341 (1884); *Comstock v. Buchanan*, 57 Barb. 127 (1864). Where stock is devised to husband and wife jointly, the assignee of the husband's interest is entitled only to his share of the dividends during life, and if the wife survives the husband the stock goes to her. *Phelps v. Simons*, 159 Mass. 415 (1893). But if the other joint owner dies first, the previous transfer of the survivor is effective and conveys the whole. *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373 (1849). Where two persons own stock in common, replevin will not lie by one as against the other for his part of the stock unless there was a conversion. *Barrowcliffe v. Cummins*, 66 Hun, 1 (1892).

³ *Garrick v. Taylor*, 29 Beav. 79 (1860); *Hill's Case*, L. R. 20 Eq. 585 (1874).

⁴ *Stover v. Flack*, 41 Barb. 162 (1862). Where several parties buy and sell a certain stock in the name of one of themselves and close the deal, a subsequent purchase of the same stock by that one does not enure to their common benefit. *Kennedy v. Porter*, 109 N. Y. 526 (1888). Although three stockholders do, by an instrument similar to a bill of sale, sell their stock to a fourth stockholder "for and during the period of six months, . . . in trust for the use and benefit of the grantors," with power to sell the same on certain terms, yet this

instrument is not a sale or trust agreement, but is merely a power of attorney. It does not prevent the fourth stockholder from selling his own stock on such terms as he chooses, even though he does not sell the stock of the others, it not appearing that the sale of his stock prevented his selling the stock of the others. The instrument conferred merely at most "only a dry legal title for the mere purpose of sale, and with the power of sale carefully circumscribed." *Levi v. Evans*, 57 Fed. Rep. 677 (1893). Where several parties agree to purchase land in the name of a corporation in exchange for stock to be taken in the name of one of them, the others may compel the latter to account for the stock. *King v. Barnes*, 109 N. Y. 267 (1888). See also § 252, *supra*. A partnership or joint ownership of stocks between two persons may be shown by the acts and contracts of the parties and by the fact that the property clearly owned by them in common was used in the acquisition of the other property. *Beardsley v. Beardsley*, 138 U. S. 262 (1891). Where several parties buy a certificate of stock in fixed proportions, and the certificate is taken by one for the benefit of all, he is a bailee for the others and not a vendor. *Coquard v. Wernse*, 100 Mo. 137 (1890). In a joint operation in stocks no bill for an accounting will lie where by mutual consent the joint operation was ended, and one

frauds does not apply to such an arrangement.¹ A drunken person's sale of stock may be set aside if an undue advantage was taken.²

§ 321. *Sales, purchases, and transfers by agents.*—A claim that a person purchased stock as trustee or agent to pay for and carry the same for the benefit of another person is a claim which can be proved by oral testimony, but must be clearly proved, and must be founded on a sufficient consideration. “Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty.”³ Stock may be purchased by an agent; and in making such a purchase the agent is not permitted to make a secret profit, even though he acts without compensation.⁴ Where an agent conceals from his principal the amount of stock received by the agent for property, and keeps a part of the stock, the principal may hold him liable for the highest market value of the stock reached between the act and a reasonable time after discovery of the act by the principal.⁵ The real

sold his stock while the other held his. *Keller v. Swartz*, 137 Pa. St. 65 (1890). Where a person has a one-third interest in certain stock issued to another person, and the company is reorganized, and is then reorganized a second time, the former person may compel the latter person to account for the stock finally received, on the basis of a partnership in the stock. *Reilly v. Freeman*, 1 N. Y. App. Div. 560 (1896). Where one party loans money to another party to buy stock in a certain company, such stock to be delivered to the former party in pledge, and the latter party uses the stock for another purpose, the loan of the money is not a mere loan, but the money is impressed with a trust, and this trust follows the stock as against non-*bona fide* holders. *Barnard v. Hawks*, 111 N. C. 333 (1892). See also § 333, *infra*.

¹ See § 339, *infra*.

² A sale of stock by a drunken person for an insufficient consideration will be set aside; and if, without his

fault, he is unable to restore the amount received, it will be provided for in the final decree. *Thackrah v. Haas*, 119 U. S. 499 (1886).

³ *Levi v. Evans*, 57 Fed. Rep. 677 (1893).

⁴ *Kimber v. Barber*, L. R. 8 Ch. App. 56 (1872), holding that, where a person offers to buy for another, stock at a certain price, but buys it at a less price and keeps the difference, he is liable to the vendee for his gains. *Keyes v. Bradley*, 73 Iowa, 589 (1887). Where an agent is entitled to all that land is sold for above \$50,000, and a sale is made for \$10,000 cash and \$44,000 in stock, par value, he must prove what the stock was worth. He cannot assume that it was worth par. *Anderson v. Avis*, 62 Fed. Rep. 227 (1894).

⁵ *McKinley v. Williams*, 74 Fed. Rep. 94 (1896). Where an agent or broker is employed to buy stock for a “pool,” and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages

owner of stock may compel the nominal owner to transfer the stock to him.¹ The corporation may disregard the nominal holder and allow the real owner to sell and transfer the stock.² Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequently attached for a debt of such agent or trustee, and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship.³ Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account, and need not resort to an action at law.⁴ The relation of an agent towards his principal in the purchase, sale, or holding of stock exists where a "dummy" is used to shield the real owner from liability on the stock.⁵ A stockholder may of course sell stock through an agent.⁶ But power to sell does not give power to pledge.⁷ Where an agent writes the stock-

for fraud if he charges the "pool" more than the stock cost him. *Manville v. Lawton*, 19 N. Y. Supp. 587 (1892).

¹ *Colquhoun v. Courtenay*, 43 L. J. (Ch.) 338 (1874). Where a person subscribes for stock in the name of another as trustee, he may maintain an action to compel the trustee to account for the subscription and to turn it over upon payment being made. *McComb v. Frink*, 149 U. S. 629 (1893).

² *Sabin v. Bank of Woodstock*, 21 Vt. 353 (1849), holding also that the nominal holder is not protected, although he subsequently becomes the real owner of the stock.

³ *Hovey v. Bradbury*, 112 Cal. 620 (1896).

⁴ *Benedict v. Moore*, 76 Fed. Rep. 472 (1896); 87 Fed. Rep. 523.

⁵ See § 253, *supra*.

⁶ See ch. XXV, *infra*, on stock-brokers. A person may assign stock to another with discretionary power to

sell at any time the latter thinks best, and pay the former's creditors therefrom. *Neilson's Appeal*, 13 Atl. Rep. 943 (Pa., 1888). Where an agent to sell stock is to have any excess of price over a sum named to him by the vendor, and the agent finds a customer at an advanced price and the vendor refuses to sell, the agent may recover such profit as he lost thereby. *Mattingly v. Roach*, 84 Cal. 207 (1890). An agent authorized to sell stock may sell part of it. *Ulster, etc. Inst. v. Fourth Nat. Bank*, 8 N. Y. Supp. 162 (1889). See also various decisions in § 375, *infra*.

⁷ See § 326, *infra*. A stockholder's power of attorney to his agent, "to exchange old issues or certificates [of stock] and receive new issues or certificates in lieu thereof," does not authorize the agent to sell or pledge the stock.

The corporation is liable for allowing a transfer to a third person on such authority. *Quay v. Presidio*,

holder's name on the back of the certificate of stock, and disposes of it without authority, he is guilty of conversion and may be arrested.¹ An agent's written authority to transfer stock is revoked by death.² But where stock is transferred to a trustee to sell with the stock of other persons, the trustee's power of sale is not revoked by the death of the transferrer.³

The principal and most difficult questions connected with an agency herein arise where the owner of stock indorses it in blank, and places it in the hands of an agent, and the agent, in violation of his orders, then sells the stock to a *bona fide* purchaser. The law is clear that the *bona fide* purchaser is protected in his ownership of the stock.⁴

§ 322. *Purchases of stock by guardians, executors, and trustees.*—In England, at an early day, the common-law rule was declared to be that guardians, executors, and trustees had no right to invest the trustee fund in the stocks of private corporations, and that if they did so they themselves were personally liable for the moneys so invested.⁵ The rigor of this rule has been relaxed somewhat in England, by statute and by orders in chancery, so that such investments may be made in the stock of the banks of England and of Ireland and the East India Company.⁶ A trustee authorized to invest in the stock of any company incorporated by act of parliament cannot invest in the stock of a company organized under the general acts.⁷ In

etc. R. R., 82 Cal. 1 (1889). Where a person gives to another a general power of attorney, covering the sale and transfer of all stocks, etc., the attorney cannot, by delivering up the certificate therefor to the corporation, transfer the stock of his principal into his own name. The corporation is bound to inquire further. *Taft v. Presidio*, etc. R. R., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). Power of an agent to sell does not give him power to pledge for his own use; and where the corporation with knowledge of the facts allows a transfer it is liable to the owner. *Read v. Cumberland Tel. etc. Co.*, 93 Tenn. 482 (1894).

¹ *Reigner v. Spang*, 5 N. Y. App. Div. 237 (1896).

² *Re Kern's Estate*, 176 Pa. St. 373 (1896).

³ *Hiller v. Ladd*, 80 Fed. Rep. 794 (1897).

⁴ See § 351, *infra*.

⁵ *Trafford v. Boehm*, 3 Atk. 440 (1746), where the investment was in bank and South Sea stock. *Lewin on Trusts*, 281 (7th ed., 1879), says that, "unless specially given power, it is settled in England that a trustee may not invest the trust fund in the stock of any private company, as South Sea stock, bank stock, etc.; for the capital depends upon the management of governors and directors, and is subject to loss."

⁶ Lord St. Vincent's Act, 22 & 23 Vict., ch. 35, § 32; 23 & 24 Vict., ch. 38.

⁷ *Re Smith*, [1896] 2 Ch. 590.

this country, aside from a few *dicta* and a few decisions to the contrary, the English rule, in its original integrity, is upheld and followed. The weight of authority clearly holds that the investment of trust funds in the stock of railroad, insurance, bank, manufacturing, or other corporations is made at the peril of the trustees.¹ The *cestui que trust* may hold the trustee lia-

¹In New York the case of *King v. Talbot*, 40 N. Y. 76 (1869), aff'g 50 Barb. 453, clearly enounces and sustains this rule. See also *Adair v. Brimmer*, 74 N. Y. 539, 551 (1878), where the trustees were held liable for selling coal lands, taking in pay coal stocks, they being authorized by the will to invest in such securities as they deemed safe. *Mills v. Hoffman*, 26 Hun, 594 (1882); reversed in 92 N. Y. 181, but not on this point; *Ackerman v. Emott*, 4 Barb. 626 (1848). See also *Brown v. Campbell*, Hopk. Ch. (2d ed.) 265 (1824). In Pennsylvania the rule is the same. *Nyce's Estate*, 5 Watts & S. 254 (1843), holding the trustee liable for investment in United States Bank stock, although the guardian approved of the trustee's investment; *Morris v. Wallace*, 3 Pa. St. 319 (1846), where the investment was in the stock of a suspended bank. In *Worrell's Appeal*, 9 Pa. St. 508 (1848), a guardian was held liable for an investment in the stock of the Schuylkill Navigation Company, although dividends had been accepted by the *cestui que trust*; and this ruling was sustained on a second appeal, 23 Pa. St. 44 (1854). In *Rush's Estate*, 12 Pa. St. 375 (1849), however, under the terms of the will, stock in the Lehigh Coal and Navigation Company was approved, and this case was distinguished from *Worrell's Appeal*, 9 Pa. St. 508 (1848), on the second appeal of that case, 23 Pa. St. 44 (1854). In *Hemphill's Appeal*, 18 Pa. St. 303 (1852), United States Bank stock was held not good. In *Pray's Appeal*, 34 Pa. St. 100 (1859), manufacturing corporation stock was disapproved, the

works being unfinished, and the stock not paid up, and the ruling in *Barton's Estate*, 1 Pars. Sel. Cas. 24 (1842), was doubted. In *Ihmsen's Appeal*, 43 Pa. St. 431 (1862), railroad stock was held not good. In New Jersey the rule is the same. *Gray v. Fox*, 1 N. J. Eq. 259 (1831); *Ward v. Kitchen*, 30 N. J. Eq. 31 (1878). Also in New Hampshire. In *Kimball v. Reding*, 31 N. H. 352 (1855), stock in a contemplated railroad was disapproved. In *French v. Currier*, 47 N. H. 88, 99 (1866), unproductive stock was held not good. In Massachusetts the tendency is to favor a contrary rule. "Trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments." But where the trustee invested over a fifth of the estate in Union Pacific Railroad stock, and afterwards invested a further amount in the same stock, he was charged with the loss due to the second investment. *Dickinson's Appeal*, 152 Mass. 184 (1890). In *Harvard College v. Amory*, 26 Mass. 446 (1830), express power was given. In *Lovell v. Minot*, 37 Mass. 116 (1838), the stock was taken as security. *Kinmonth v. Brigham*, 87 Mass. 270 (1862), and *Brown v. French*, 125 Mass. 410 (1878), were not cases of investments in stocks. *Hunt's Ap-*

ble for the amounts so invested, together with interest upon the same. But where the trustee is authorized to purchase stock he is not liable for the embezzlements of an agent whom with due care he employs to make the purchase.¹

§ 323. *Sale or pledge of stock by trustee in breach of his trust.*—It is the function and duty of a trustee to keep and preserve the trust property, and to apply the income according to the terms of the instrument creating the trust. As a general rule it is not his duty or his right to sell or change the investment. Unless the instrument creating the trust authorizes the sale of the trust property, it is a breach of trust for the trustee to make a sale.² In this respect the powers of a trustee

peal, 141 Mass. 515 (1886), is a dictum, the decision being that the taking of a national-bank certificate of deposit is legal.

Several of the southern states clearly uphold the rule that trustees, etc., may invest the trust funds in stocks. *Boggs v. Adger*, 4 Rich. Eq. (S. C.) 408 (1852), holds United States Bank stock good. *Washington v. Emery*, 4 Jones, Eq. (N. C.) 32 (1858), approves railroad stock. In *Gray v. Lynch*, 8 Gill (Md.), 403 (1849), and in *Smyth v. Burns*, 25 Miss. 422 (1853), bank stock was held good. In *Lamar v. Micou*, 112 U. S. 452 (1884), and 114 U. S. 218 (speaking for Georgia and Alabama), bank and railroad stock were held good, but not Confederate bonds. See also on this subject, generally, 40 Am. Dec. 515, notes. An executor who is interested in a corporation, and gets a commission for selling its stock, is liable to replace funds which he induces the *cestui que trust*, a woman, to invest in such stock. *Potter's Appeal*, 56 Conn. 1 (1887). Where all the stockholders assign stock to the president to sell to pay corporate debts, he may assign part of it to himself to pay a debt due to himself from the corporation. *Patterson v. Lennig*, 118 Pa. St. 571 (1888). Where the trustee is expressly authorized to invest in bank

stock he is not liable to the estate for losses, though the investment is made in his individual name. *Pensyl's Appeal*, 15 Atl. Rep. 719 (Pa., 1888). As to statutory and constitutional provisions, see Part VII, *infra*. In Kentucky the statutes authorize the retention by a guardian of an investment in good bank stock. *Fidelity, etc. Co. v. Glover*, 90 Ky. 355 (1890). A trustee for an infant cannot convey land to a corporation and take stock in payment. *Randolph v. East Birmingham Land Co.*, 104 Ala. 355 (1894).

¹*Speight v. Gaunt*, L. R. 9 App. Cas. 1 (1883). The trustee is not liable for loss due to the fact that the certificates of stock purchased by him were forgeries, provided he used due care. *Isham v. Post*, 141 N. Y. 100 (1894).

²*Bohlen's Estate*, 75 Pa. St. 304 (1874); *Bayard v. Farmers', etc. Bank*, 52 Pa. St. 232 (1866); *Jaudon v. National City Bank*, 8 Blatchf. 430 (1871); S. C., 13 Fed. Cas. 376; *aff'd*, *Duncan v. Jaudon*, 15 Wall. 165 (1872). On the relations and duties of trustees generally in regard to stock, see also *Perry on Trusts* (3d ed.), §§ 439, 543. Where several stockholders, including a trustee, sell, his failure to obtain an order of court does not constitute a failure to deliver in the specified time, where the transferee

differ widely from those of an executor or administrator, and the rule applies to a trustee holding in trust shares of stock. Moreover, under ordinary circumstances, a trustee cannot sell stock held in trust, although such sale be for the purpose of investing the proceeds in other stock or other property.¹

§ 324. Where a trustee improperly sells shares of stock belonging to the trust estate, the *cestui que trust* has a right to elect to have the stock restored or the amount received for it paid over, together with interest from the time of the sale.² Were the rule otherwise the trustee would profit by his own

accepted delivery without such order. *German Sav. Inst. v. De La Vergne*, etc. Co., 70 Fed. Rep. 146 (1895).

¹ A trustee who sells stock for the purpose of investing in real estate may be compelled to replace it. *Earl Powlet v. Herbert*, 1 Ves. Jr. 297 (1791). Cf. *Bohlen's Estate*, 75 Pa. St. 304 (1874); *Peckham v. Newton*, 15 R. I. 321 (1886). The *cestui que trust* may waive the objection. *Duncan v. Jaudon*, 15 Wall. 171 (1872). *Washington v. Emery*, 4 Jones, Eq. (N. C.) 32 (1858), holds that a change in the investment is allowable if there is good reason to believe that the estate will be benefited. Trustees should sell the stock if depreciation is probable. *Ward v. Kitchen*, 30 N. J. Eq. 31 (1878). But they are not liable for failure to sell if such a course is pursued in good faith and in the exercise of a sound discretion. *Bowker v. Pierce*, 130 Mass. 262 (1881); *Parker v. Glover*, 42 N. J. Eq. 559 (1887); *Stewart's Appeal*, 110 Pa. St. 410 (1885),—the last case holding also that a sale by the trustee to himself, even at the market price, was voidable at the instance of the interested parties. The trustee cannot change the stock bequeathed. *Murray v. Feinour*, 2 Md. Ch. 418 (1851). A trustee is not liable merely because he did not sell a security in a falling market, the investment itself being legal. *Re Chapman*, [1896] 2 Ch. 763. Unless the will permits it, an invest-

ment cannot be changed into stock. *Re Warde*, 2 Johns. & H. 191 (1861). Cf. *Waite v. Whorwood*, 2 Atk. 159 (1741). A trustee of an estate has implied power to sell railroad stock belonging to the estate in order to reinvest the proceeds in securities which the law allows him to invest in. *Toronto, etc. Co. v. Chicago, etc. R. R.*, 64 Hun, 1 (1892). See also *Re Bannison*, 60 L. T. Rep. 859 (1889). In *Jones v. Atchison, etc. R. R.*, 150 Mass. 304 (1889), the court upheld a sale of stock made by the trustee for the purpose of changing the investment.

² *Harrison v. Harrison*, 2 Atk. 121 (1740); *Bostock v. Blakeney*, 2 Bro. Ch. 653 (1789); *Pocock v. Reddington*, 5 Ves. Jr. 794 (1801); *Long v. Stewart*, 5 Ves. Jr. 800, n. (1801); *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 117 (1816); *Re Massingberd's Settlement*, 60 L. T. Rep. 620 (1889). A trustee selling stock at a high price and then replacing it at a lower figure is liable to the *cestui que trust* for the high price. *Snyder v. McComb*, 39 Fed. Rep. 292 (1889). Where a corporation is in a precarious condition, a trustee holding stock in it may sell the stock, even though he does not sell stock held by him personally, and even though it turns out subsequently that it would have been better not to have sold. *Owen v. Campbell*, 100 Mich. 34 (1894). A trustee who reports a sale of stock, but makes the

breach of trust in case there was a decline in the value of the stock. The trust attaches to any stock standing in the name of the trustee, and, although the same certificates are not retained, an equal amount of other similar stock owned by the trustee may be applied to the trust.¹ And in all cases where the trustee has sold stock belonging to the trust estate in breach of his duties as trustee, he may be held liable in damages by the *cestui que trust* or his representative for the value of the stock.² A specific performance in regard to a trust estate of stock may be decreed.³

§ 325. *Transferee of stock from trustee is protected, when.*—A vendee or pledgee of stock, directly from a trustee, is or is not protected in his interest in the stock, according as he is or is not chargeable with notice of the fact that the stock belongs to a trust estate, and that the trustee is using it in breach of the trust. Anything that is sufficient to put a party on inquiry is considered equivalent to actual notice, if inquiry be not made and reasonably satisfied. The law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence would have apprised him. This is called constructive notice, and has the same effect as an actual notice of the trusteeship. The most common instance of a con-

sale subsequently to a relative at a low price, is liable. *Schweitzer v. Bonn*, 31 Atl. Rep. 24 (N. J., 1895).

¹ *Pinkett v. Wright*, 2 Hare, 120 (1842). A trustee is liable for breach of trust of co-trustee in regard to stock where the former is negligent in keeping himself informed as to the transactions of the latter in the trust property. *Bullock v. Bullock*, 55 L. T. Rep. 703 (1886). Trust stock was pledged by a trustee to secure his own debt in 1864, the pledgee knowing that the stock was trust stock; the stock was sold by the pledgee in 1867; the *cestui que trust* learned thereof in 1877 and commenced suit against the executors of the surety for the trustee; judgment was rendered in 1882, and executors commenced this suit against the pledgee within three years after 1882.

Held, that no laches or statute of limitations barred the suit. *Blake v. Traders' Nat. Bank*, 145 Mass. 13 (1887). See 53 Pac. Rep. 617.

² A trustee authorized to sell stock, but selling in breach of trust, is liable for the value of the stock at the time of commencing suit against him, and interest; also for dividends declared after the breach of trust; or the *cestui que trust* may demand the value of the stock at the time of the breach of trust, and interest, or a replacing of similar stock and dividends. *McKim v. Hibbard*, 142 Mass. 422 (1886). A trustee to use stock to pay debts may assign a part of the stock to pay a debt due to himself, if in good faith and at a full valuation. *Patterson v. Lennig*, 118 Pa. St. 571 (1888).

³ See § 338, n., *infra*.

structive notice that stock being sold belongs to a trust estate is where the words "trustee" or "in trust," either with or without the name of the *cestui que trust*, are written on the face of the certificate of stock after the name of the person in whose name it stands on the corporate books. It is well established that such words, indicating a trustee ownership, are notice to the purchaser that his vendor is selling trust property, and that he must ascertain whether the trustee has any power to sell the stock.¹ There are many other facts which will prevent the

¹ "A certificate for shares of stock running to 'A. B., trustee,' or to 'A. B., in trust,' without disclosing the names of beneficiaries or the particulars of the trust, is notice to a purchaser of the shares that 'A. B.' does not hold them in his own right, but as a trustee." *Gerard v. McCormick*, 130 N. Y. 261, 267 (1891); *Shaw v. Spencer*, 100 Mass. 382 (1868), the court saying that the word "trustee" means "trustee for some one whose name is not disclosed," and that a custom of trade disregarding such words on certificates of stock is illegal and ineffectual to protect the purchaser. To same effect, *Jaudon v. National City Bank*, 8 Blatchf. 430 (1871); S. C., 13 Fed. Cas. 376; *aff'd*, *Duncan v. Jaudon*, 15 Wall. 165, 176, where the court says the purchasers "are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the *cestui que trust*." *Gaston v. American Ex. Nat. Bank*, 29 N. J. Eq. 98 (1878); *Walsh v. Stille*, 2 Pars. Sel. Cas. (Pa.) 17 (1842); *Simons v. Southwestern R. R. Bank*, 5 Rich. Eq. (S. C.) 270 (1853), where a master in chancery held the stock in his own name officially; *Loring v. Brodie*, 134 Mass. 453 (1883); *Loring v. Salisbury Mills*, 125 Mass. 138 (1878); *Sweeney v. Bank of Montreal*, 5 Can. Law T. 503 (1885); *Budd v. Munroe*, 18 Hun, 316 (1879); *Bank of Montreal v. Sweeny*, L. R. 12 App. Cas. 617 (1887). A pledgee of stock which runs to a person as

trustee is bound to investigate the trust, and cannot rely on a paper signed by a person who claims to be the sole beneficiary, but who is not. *First Nat. Bank v. Nat. Broadway Bank*, 22 N. Y. App. Div. 24 (1897). In California, however, it is held that, although the word "trustee" on the face of the certificate, followed by the name of the *cestui que trust*, may give notice that it is trust property, yet that where the word "trustee" is but a cloak for an agency, for the purpose of shielding the real owner from liability on his stock, and to conceal the fact that he is dealing in stocks, the court will disregard it, and will not protect the real owner against his agent's unauthorized sale of the stock. *Brewster v. Sime*, 42 Cal. 139 (1871); *Thompson v. Toland*, 48 Cal. 99 (1874). The word "trustee" added to the name appearing on the certificates of stock does not require the purchaser to make extraordinary investigations. The fact that the vendor sells as trustee is not notice that he intends to commit a breach of trust, there being nothing on the record to indicate such intent. *Graffin v. Robb*, 84 Md. 451 (1896). Where a certificate of stock runs to a person absolutely and passes into *bona fide* hands, the corporation is not liable for allowing a transfer, even though such stock was held in trust and the corporation knew the fact so to be. No harm was done by the transfer, inasmuch as the

vendee from claiming that he is a *bona fide* holder of the stock. Thus, if the stock is pledged to a bank by the trustee, who is a director of a bank, and the bank is prohibited from loaning to its directors, the bank is not a *bona fide* holder, though without notice or knowledge of the trusteeship.¹

In England, the House of Lords has decided that certificates of stock in railway companies are not negotiable in any respect, and that a *bona fide* transferee of the certificate is not protected until he has obtained registry in the corporate books.² In this country a different rule prevails, and it is accepted and assumed as elementary that a *bona fide* purchaser for value of certificates of stock belonging to a trust estate, and sold in breach of trust, is nevertheless protected in his purchase, although he has not registered the transfer on the corporate books. A *bona fide* purchaser through several mesne conveyances, starting from a trustee who sells the stock in breach of trust, is protected.³

certificate had already passed into *bona fide* hands. *Smith v. Nashville*, etc. R. R., 91 Tenn. 221 (1892). A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. *Winter v. Montgomery*, etc. Co., 89 Ala. 544 (1890); *Salisbury Mills v. Townsend*, 109 Mass. 115 (1871). Where stock standing in the name of a person as trustee is sold and the certificates are turned in for transfer without the purchaser seeing them, he takes good title, even though there was a breach of trust, he not knowing of such breach nor of the trusteeship. *Stinson v. Thornton*, 56 Ga. 377 (1876). Notice to a person attending to the transfer is not notice to the transferee.

¹ *Albert v. Baltimore Savings Bank*, 2 Md. 159, 171 (1852). A bank which receives trust stock as security for a loan, and afterward, on payment of the loan, transfers the stock to parties designated by the pledgor, is liable to the *cestui que trust* for aiding in the latter transfer. *Magnus v. Queens-*

land Nat. Bank, L. R. 37 Ch. D. 466 (1888). See 40 Alt. Rep. 80.

² *Shropshire Union, etc. Co. v. Regina*, L. R. 7 H. L. 496 (1875). *Cf. Dodds v. Hills*, 2 Hem. & M. 424 (1865). *Cf. §§ 378, 380, 416, infra.* A *cestui que trust* of stock in England may defeat a *bona fide* purchaser's title to the stock by suing for the stock before a transfer is made on the corporate books. *Roots v. Williamson*, L. R. 38 Ch. D. 485 (1888). In *Powell v. London & Prov. Bank*, [1893] 1 Ch. 610; *aff'd*, [1893] 2 Ch. 555, the transferee lost title to stock which really belonged to a trust estate, but which stock stood in the trustee's name absolutely as the full owner, although the transferee had obtained a transfer on the books, it appearing that the transferee had filled in a part of the essential blanks.

³ *Salisbury Mills v. Townsend*, 109 Mass. 115 (1871); *Stinson v. Thornton*, 56 Ga. 377 (1876); *Cohen v. Gwynn*, 4 Md. Ch. 357 (1848). Where, however, the trustee has been removed by a court and another trustee appointed in the state of the corporation, a

§ 326. The mere fact that a purchaser of stock knows he is buying from a trustee, and that the stock belongs to the trust estate, puts the purchaser to no inquiry except that of ascertaining whether the trustee has power to sell the stock or vary the investment. If he has such power the purchaser will be protected, although the trustee uses the money for his own private purposes, provided the purchaser has no notice of such an intent on the part of the trustee.¹ The purchaser has a right to assume that the object of the sale is to invest the funds in a permanent investment or to discharge liabilities.² Where, however, the purchaser knows that his vendor sells or pledges the stock as trustee, and also knows that the sale or pledge is for the private debts or purposes of the trustee, the purchaser is chargeable with knowledge of the breach of trust, and is not protected.³ Nor is a pledgee of stock from a trustee, acting as trustee, protected where the trustee is authorized merely to sell the stock.⁴ Power to sell does not confer power to pledge.⁵

purchaser of the certificates held by the old trustee is not protected, his purchase being after the removal. *Sprague v. Cocheco Mfg. Co.*, 10 Blatchf. 173 (1872); S. C., 22 Fed. Cas. 960. But in *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874), it was held that a successful suit in a state not the state of the corporation, to remove a trustee, does not affect a *bona fide* purchaser of the certificate from the trustee, the purchase being made pending the suit; and that the corporation allowing registry of the new trustee as holder of the stock, and issuing new certificates to him, is liable in damages to the purchaser from the old trustee.

¹ *Hughes v. Drovers', etc. Bank*, 38 Atl. Rep. 936 (Md., 1897); *Perry on Trusts*, § 225, 3d ed. (1882); *Lewin on Trusts*, 417, 7th ed. (1879); *Godefroi on Trusts*, 125, 127 (1879).

² *Ashton v. Atlantic Bank*, 85 Mass. 217 (1861), where the trustee sold land, took notes in payment, and stock as collateral, and sold the notes with the collateral.

³ *Jaudon v. National City Bank*, 8 Blatchf. 450 (1871); S. C., 13 Fed. Cas. 376; *aff'd, sub nom. Duncan v. Jaudon*, 15 Wall. 165; *Walsh v. Stille*, 2 Pars. Sel. Cas. (Pa.) 17 (1842); *White v. Price*, 39 Hun, 394 (1886); *Simons v. Southwestern R. R. Bank*, 5 Rich. Eq. (S. C.) 270 (1853); *Shaw v. Spencer*, 100 Mass. 382 (1868), holding also that silence while the vendee pays an assessment is no waiver.

⁴ *Loring v. Brodie*, 134 Mass. 453 (1883). Pledgees from the trustee for antecedent debts are not *bona fide* holders without notice, even though the form of a public sale was gone through. *Darling v. Potts*, 118 Mo. 506 (1893).

⁵ *Merchants' Bank v. Livingston*, 74 N. Y. 223 (1878); *Manhattan Bank v. Walker*, 130 U. S. 267 (1889); *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396 (1878). The power of an agent to sell does not authorize him to pledge. *First Nat. Bank v. Taliaferro*, 72 Md. 164 (1890). On this subject see also § 321, *supra*.

§ 327. *Rights and liabilities of the corporation allowing a transfer by a trustee in breach of his trust.*—Where a corporation has notice that a stockholder holds his stock as trustee for another, and the means of ascertaining the character of that trust are within the power of the corporation, it is bound to refuse to allow a registry of the trustee's transfer until it is satisfied that the trustee has power to make the transfer.¹ If the corporation allows the transfer, and the trustee had no power to make it, the corporation is liable to the *cestui que trust*. The fact that the certificate runs to the holder as "trustee" is sufficient notice to the corporation.² Notice to a board of directors is notice to all subsequent boards.³ The corporation is bound to see that the sale by the trustee is made in accordance with the terms of the trust. Thus, it is liable if it permits a sale and transfer by one trustee when there are two trustees; and a general power of attorney by the other trustee authorizing sales will not protect the corporation in its registry of a trans-

¹ *Chapman v. City Council*, 28 S. C. 373 (1888); *Bayard v. Farmers', etc. Bank*, 52 Pa. St. 232 (1866), where a refusal of the corporation to transfer until the terms of the trust were examined by its attorney and found to allow the sale was sustained. The corporation cannot, however, retain the copies of the probate records used in investigating. *Bird v. Chicago, etc. R. R.*, 137 Mass. 428 (1884). In the transfer of trust stock the corporation may very properly refuse to allow a registry where the sale is made by the trustee at a price far below its market value. *Succession of Boullemt*, 39 La. Ann. 1046 (1887). Where stock is transferred to a trustee by the executors, the corporation knowing of the trust, and the corporation subsequently allows the trustee to transfer the stock to third persons, the corporation is liable to the *cestui que trust* if such last-mentioned transfer is fraudulent and in breach of trust. *Marbury v. Ehlen*, 72 Md. 206 (1890). If the will gives the executrix power to sell the stock,

the corporation is protected in allowing transfers by the executrix and trustee, even though it did not know the contents of the will. Although the transfer is to a bank, the corporation is not bound to know that the transfer is a pledge and not a sale. *Peck v. Providence Gas Co.*, 17 R. I. 275 (1891). Where, upon reorganization, the committee issues transferable certificates exchangeable into stock of the new corporation when it is formed, the new corporation is liable for allowing an exchange by a person to whom a trustee has illegally transferred the certificates issued to him. *Mobile, etc. R'y v. Humphries*, 7 S. Rep. 522 (Miss., 1890).

² See § 325, *supra*. In the case of *Stockdale v. South Sea Co.*, Barn. Ch. 363 (1740), the court said, however: "These great companies are only to consider the person in whose name the stock is standing, unless the trust of that stock is declared in their books."

³ *Mechanics' Bank v. Seton*, 1 Pet. 299 (1828).

fer signed by one only.¹ It is liable for allowing an illegal registry of a trustee's transfer, when the trust is for an unmarried woman, to take effect when she shall marry.² If there are several *cestui que trust*, the corporation is liable for allowing one of them to transfer the whole interest in the stock, where by mistake of the corporation the stock had been registered in the name of that one, and not in the name of the trustee.³ If, however, the *cestui que trust* is guilty of laches in taking steps to obtain his rights, the corporation is discharged.⁴ The remedy of the *cestui que trust* is in equity, not at law.⁵ A waiver of former breaches of trust is no waiver of the one complained of; and a judgment against the trustee himself is no bar to the suit against the corporation, except to the extent that satisfaction has been obtained.⁶ The corporation may be compelled by the court to purchase an equal amount of stock and register it for the benefit of the *cestui que trust*.⁷ Neither the corporation which allows a transfer by a trustee nor a purchaser from the trustee of shares of stock need look to the application by the trustee of the purchase price. All that they are required to investigate is the power to transfer.⁸

§ 328. *Sales of stock by a guardian.*—At common law a guardian may sell the personal property belonging to him as guardian without obtaining any special license or authority; and a *bona fide* purchaser from him of such property is protected, and is entitled to the property, even though the guardian misappropriates the proceeds of the sale.⁹ This rule applies to shares

¹ Bohlen's Estate, 75 Pa. St. 304, 312 (1874). Nor where the signatures of the other trustees are forged by one. *Cottam v. Eastern Counties R'y*, 1 Johns. & H. 243 (1860). In England one executor or trustee cannot assign railway stock. All must join. *Barton v. North Staffordshire R'y*, L. R. 38 Ch. D. 458 (1888).

² *Magwood v. Railroad Bank*, 5 S. C. 379 (1874).

³ *Farmers', etc. Bank v. Wayman*, 5 Gill (Md.), 336 (1847).

⁴ *Albert v. Baltimore Sav. Bank*, 1 Md. Ch. 407 (1849); *aff'd*, 2 Md. 159 (1852).

⁵ *Loring v. Salisbury Mills*, 125 Mass.

138 (1878). In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties. The defense of prescription may prevail. *St. Romes v. Levee, etc. Co.*, 127 U. S. 614 (1888).

⁶ *Loring v. Salisbury Mills*, 125 Mass. 138 (1878).

⁷ *Bohlen's Estate*, 75 Pa. St. 304 (1874).

⁸ *Hughes v. Drovers', etc. Bank*, 38 Atl. Rep. 936 (Md., 1897); also § 326.

⁹ *Field v. Schieffelin*, 7 Johns. Ch. 150 (1823); *Ellis v. Essex Merrimack*

of stock.¹ In most of the states, however, statutes have been passed requiring guardians to obtain the consent of a court before selling the personal property of his ward.² If such a statutory permission to sell is required, and the vendee of stock has notice that his vendor sells as guardian, the vendee is bound to see that the requisite permission to sell has been given.³ A person taking a certificate of stock running to a guardian and indorsed by him in blank must inquire into the authority of the guardian to dispose of the stock, and he must examine the proceedings of the court authorizing the sale and see that the proceedings are in accordance with the statute.⁴ An order of the court allowing the guardian to sell is not authority to him to pledge the stock, and the pledgee is bound to take notice of that fact.⁵ Where stock is sold by a foreign guardian according to the laws of the state of the guardianship, title passes and the purchaser is protected.⁶

§ 329. *Sales of stock by an executor or administrator.*—It is the duty of an executor or administrator of an estate to collect the assets, pay the debts, and distribute the remainder according to the provision of the will or of the statute of distribution.⁷ In order to pay the debts the executor may sell the personal

Bridge, 19 Mass. 243 (1824), holding that a *bona fide* purchaser from the guardian of a person *non compos mentis* is protected.

¹ *Lamar v. Micou*, 112 U. S. 452, 475 (1884), the court saying: "He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds." See also *Bank of Virginia v. Craig*, 6 Leigh (Va.), 399, 432 (1835), to the same effect, and holding that the corporation is not liable for a breach of trust by the guardian in selling the stock. The court said: "If the guardian defrauds his ward, his sureties are responsible; if the purchaser combines in the fraud, he too is chargeable; but the bank cannot interfere and arrest the transfer of its stock by the legal holder of the scrip upon such pretenses. It would trammel and embarrass such transactions

so as to impede materially that transferable character which is one of the most valuable attributes of stock."

² Mass. Rev. Stat., ch. 79, § 21.

³ *Atkinson v. Atkinson*, 90 Mass. 15 (1864).

⁴ *O'Herron v. Gray*, 168 Mass. 573 (1897).

⁵ *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396 (1878). See also *Manhattan Bank v. Walker*, 130 U. S. 267 (1889); § 326, *supra*. The authority of a guardian given by the court to sell stock does not authorize him to pledge the stock. *O'Herron v. Gray*, 168 Mass. 573 (1897).

⁶ *Ross v. Southwestern R. R.*, 53 Ga. 514 (1874).

⁷ *Keyling's Case*, 1 Eq. Cas. Abr. 239 (1702), holding that, where the executor holds the stock for several years and it declines in value, he is chargeable with its value one year after the death of the testator.

property of the estate. Accordingly, the rule has become established that the purchaser of personal property from an executor or administrator is not bound to ascertain whether the sale is necessary in order to pay the debts of the estate, nor to see that the proceeds of the sale are applied to the debts. If he buys in good faith and for value, he is protected. Such also are the rules applicable to an executor's or administrator's sales of stock.¹ The executors in the state of the decedent may transfer the stock of the estate, and convey a title which the corporation is bound to recognize, although the corporation itself is domiciled in another state.² The rule is otherwise, however, as

¹ *Leitch v. Wells*, 48 N. Y. 585 (1872), holding that the *bona fide* transferee is protected, although the executors had previously set aside the same stock to apply to the payment of a certain amount chargeable by the will to the estate annually; *Wood's Appeal*, 92 Pa. St. 379 (1880), holding that a *bona fide* transferee of the executor's transferee is protected, although the latter would not have been; and this even though the executor's transferee was aware whence his title came. The court held that letters of administration are always evidence of power to sell, and that an executorship differed widely from a trusteeship as regards the right to sell; *Prall v. Tilt*, 27 N. J. Eq. 393 (1876); *aff'd*, 28 N. J. Eq. 479 (1877), where the will authorized advances to the sons, and they represented to the transferee that the stock was so advanced to them by the executor; *Lowry v. Commercial, etc. Bank*, Taney, 310 (1848); S. C., 15 Fed. Cas. 1040. In this case the purchaser had no knowledge or notice that the transferor sold the stock as an executor; *Clark v. South Metropolitan Gas Co.*, 54 L. J. (Ch.) 259 (1884), sustaining a sale of stock by an administratrix of an administrator; *Re London, etc. Tel. Co.*, L. R. 9 Eq. 653 (1870), sustaining the title of a *bona fide* purchaser from the executrix as

against an assignee in bankruptcy of the deceased, the assignee having delayed his application for five years. An administrator is justified in selling stock when he fears a decline in its value, but he must be free from motives of self-interest. *Fluck v. Lake*, 54 N. J. Eq. 638 (1896). An executor may transfer stock of the estate by signing his individual name to the transfer. *Mahaney v. Walsh*, 16 N. Y. App. Div. 601 (1897). A person is not such a stockholder as can maintain a suit against directors for fraud, where his stock has been transferred to another, nor can he maintain his suit on the ground that he owns a certificate of stock standing in the name of another and transferred in blank on the back, such transfer being signed by the administratrix of the stockholder of record, no proof being given of the administratrix's being such or of having executed the transfer. *Thompson v. Stanley*, 73 Hun, 248 (1893).

² *Middlebrook v. Merchants' Bank*, 3 Keyes (N. Y.), 135 (1866); *Luce v. Manchester, etc. R. R.*, 63 N. H. 588 (1886); *Hobbs v. Western Nat. Bank*, 8 W. N. Cas. 131 (U. S. C. Ct., 1880). An executor or administrator may transfer stock in a foreign corporation without taking out letters in the state incorporating the company. *Re Cape May, etc. Co.*, 16 Atl. Rep.

regards executors appointed in jurisdictions out of the United States.¹ And under the collateral inheritance tax statutes, the corporation may be liable for the tax if it allows a transfer without payment of the tax by the estate.² An executor who sells stock without authority is liable for the losses to the estate thereby at that time, but is not liable for profits made by himself subsequently in dealing in that stock.³

An executor may pledge estate stock at his bank on a representation that the money is to be used for the estate; and the bank will be protected, although the note given by the executor is renewed several times, and the proceeds of the transaction were passed to the executor's private account.⁴ So, also, a *bona fide* purchaser of stock from a life tenant, to whom the administrator improperly transferred it, is protected. The remainder-man's remedy is on the administrator's bond.⁵ But a pledge

191 (N. J., 1889). In Maryland there is a statute prohibiting such transfers except in a certain way. See Rev. Code, 1888, art. 93, § 79.

¹ *Alfonso's Appeal*, 70 Pa. St. 347 (1872), holding that, in Pennsylvania, executors of a decedent, whose domicile was in Cuba, have no authority, under letters testamentary in Cuba, to transfer stock in a Pennsylvania corporation. "Domestic creditors, legatees, or next of kin should not be sent abroad in quest of property to answer their claims, when the decedent left property within the jurisdiction of the state that can be applied to meet their demands."

² In *Atty. Gen. v. N. Y. Breweries Co.*, 78 L. T. Rep. 61 (1897), the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had

taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

³ *Hiller v. Ladd*, 85 Fed. Rep. 703 (1898).

⁴ *Goodwin v. American Nat. Bank*, 48 Conn. 550 (1881); *Gottberg v. U. S. Nat. Bank*, 13 N. Y. Supp. 841 (1890), where the bonds were even registered in the names of both executors and were pledged by one. Under the English act, where shares are registered in the names of two executors jointly, the signature of both to a transfer is necessary, and the company is liable if it permits a transfer by one. *Barton v. London*, etc. R'y, 62 L. T. Rep. 164 (1889).

⁵ *Keeney v. Globe Mill Co.*, 39 Conn. 145 (1872). Where by the will of a resident of New York, duly probated in New York, two of the executors being residents of New York, stock is given to one person in trust for

of stock by an executor does not protect the pledgee, where the pledgee does not rely on the executor's power, but requires other ineffectual precautions to be taken.¹ Where the transferee of the executor knows that the transaction is not for the benefit of the estate, but is a breach of trust, he is not protected.² Where distribution is made in kind, a party who petitioned for distribution of the "property" cannot object on the ground that the property should have been sold and the money distributed.³ Frequently statutes are found requiring executors, when selling personal property of the estate, to sell the same at public auction. When such a statute exists, a purchaser at private sale is not a *bona fide* purchaser, and is not protected, and is liable for the stocks and for the dividends paid thereon after his purchase.⁴ The *bona fide* transferee of such a

another in a Connecticut corporation, such trustee cannot bring suit in the Connecticut courts to compel the executors to transfer the stock to him, even though ancillary letters have been taken out in Connecticut and one of the executors was a resident of Connecticut, and even though the trustee had attached dividends in Connecticut. *Russell v. Hooker*, 67 Conn. 24 (1895).

¹ *Moore v. American, etc. Co.*, 115 N. Y. 65 (1889).

² *Prall v. Hamil*, 28 N. J. Eq. 66 (1877). The facts in this case differed from those in *Prall v. Tilt*, 27 N. J. Eq. 393 (1876), in that the transferee knew that the stock was still owned by the executrix. A suit in equity lies to set aside an illegal sale of stock by an executor. *White v. Price*, 108 N. Y. 661 (1888); *S. C.*, 39 Hun, 394 (1886), the court saying: "A person who takes title from an executor in payment of the executor's personal debt is not a purchaser in good faith, and acquires no rights over the prior title or equities of other persons." Also, that a purchaser, buying with knowledge that the right of the executor to sell is denied and is being contested, is not a *bona fide* holder.

Cf. Keane v. Robarts, 4 Madd. Ch. 332 (1819), where it was held that, where the executor did business through an agent, the application of the proceeds from the sale of the stock to the running account between the executor and his agent was legal. A pledgee with notice of stock pledged by an executor in breach of his duty may be compelled to give up the stock. *Odd Fellows' Sav. Bank's Appeal*, 123 Pa. St. 356 (1889). A pledgee who takes with knowledge that the executor is giving the pledge in breach of trust cannot foreclose the pledge. *Bell v. Farmers', etc. Bank*, 131 Pa. St. 318 (1890). If the administrator sells to himself through "dummies," he may be compelled to disgorge. *Carter v. Good*, 57 Hun, 116 (1890).

³ *Hurley v. Hewett*, 89 Me. 100 (1896).

⁴ *Nutting v. Thomasson*, 57 Ga. 418 (1876), the court saying also that factors or brokers acting for third persons are also liable; *Nutting v. Boardman*, 43 Ga. 598 (1871), holding that the administrator's bondsmen are not proper parties to the suit; *Weyer v. Second Nat. Bank*, 57 Ind. 198 (1877), holding the purchaser lia-

purchaser, however, is protected.¹ An executor may have the duties of a trustee to perform, and then become subject to the rules governing trustees in their transfers of stock.² While a corporation may, under ordinary circumstances, allow an executor or administrator to register a transfer of stock from himself to a purchaser from him, yet, when so long a time has elapsed between the taking out of letters and the transfer that the executor has become practically a trustee, then the purchaser and the corporation must use the same precautions as in sales by a trustee.³

§ 330. *Duty and liability of the corporation in sales by executors or administrators.*—There has been great difficulty in ascertaining the rights and duties of the corporation in allowing and refusing to allow a registry on the corporate transfer-book of a sale of stock by an executor or administrator. The Bank of England, at an early day, assumed the power to refuse to allow a registry of an executor's transfer of stock that had been specifically bequeathed, unless the executor satisfied the bank that the sale was necessary to pay the debts of the estate. The courts, however, compelled it to allow registry without investigating specific legacies or the application of the proceeds of the sale.⁴ In this country the question of the lia-

ble. If the executor uses the proceeds of sales of stock for his own personal purposes, he is liable for the dividends declared after such sales up to the time of accounting, and for the market value of the stock at the time of accounting. A person taking stock from him with knowledge of the breach of trust is also liable. *McGeary's Appeal*, 6 Atl. Rep. 763 (Pa., 1886). Gradual sales by the executors at a private sale will be sustained where a public sale would have depressed the value of the stocks, and no public sale was requested by the parties interested. *Kaiser's Succession*, 48 La. Ann. 973 (1896).

¹ *Nutting v. Thomason*, 46 Ga. 34 (1872).

² *White v. Price*, 39 Hun, 394 (1886); *Prall v. Tilt*, 27 N. J. Eq. 393 (1876).

³ Where an executor holds stock for

nine years and then sells it in breach of trust, the purchaser is bound to take notice. The executorship becomes a trusteeship. *Peck v. Bank of America*, 16 R. I. 710 (1890). Where an executrix has power by the will to sell stock held in trust for heirs, the corporation is not liable for a transfer by her in breach of trust, the corporation having no knowledge thereof. The fact that the stock is transferred to banks which have no power to purchase is not notice to the corporation. The executorship in this case was merged into a trusteeship. *Peck v. Providence Gas Co.*, 17 R. I. 275 (1892).

⁴ *Pearson v. Bank of England*, 2 Bro. Ch. 529 (1789); *Bank of England v. Moffat*, 3 Bro. Ch. 260 (1791); *Hartga v. Bank of England*, 3 Ves. Jr. 55 (1796); *Bank of England v. Parsons*,

bility of the corporation has arisen on a different state of facts. The cases of *Lowry v. Commercial & Farmers' Bank of Baltimore*,¹ and *Stewart v. Firemen's Insurance Co.*,² clearly establish the rule that, where the corporation has reasonable notice of the fact that the executor is committing a breach of trust, such notice arising from the fact that the transfer is made several years after the estate should have been wound up, the corporation is under obligation to refuse to allow a registry of the transfer; and, having allowed it, the corporation is liable to the parties injured thereby.

Where, by statute, executors' sales are to be at public auction, the corporation is bound to ascertain whether the statute was complied with, and is liable for allowing a registry when the sale was a private one.³ In general, a corporation has a right

5 Ves. Jr. 665 (1800); *Bank of England v. Lunn*, 15 Ves. Jr. 568 (1809); *Austin v. Bank of England*, 8 Ves. Jr. 522 (1803); *Marryatt v. Bank of England*, 8 Ves. Jr. 524, n. (1793); *Aynsworth v. Bank of England*, 8 Ves. Jr. 524, n. (1793); *Franklin v. Bank of England*, 1 Russ. Ch. 575 (1826); *Churchill v. Bank of England*, 11 M. & W. 323 (1843); *Humberstone v. Chase*, 2 Y. & C. Exch. 209 (1836), where the executor represented that the specific legatee had died. It is "necessary" and proper for executors to unregister registered bonds before selling them. *Re Gasquoine*, [1894] 1 Ch. 470.

¹ Taney, 310 (1848); S. C., 15 Fed. Cas. 1040. The court said: "The bank not only enabled the executor to perpetrate the wrong by permitting the transfer, but co-operated in it by certifying that the title of transferee was good. Justice, therefore, requires that it should bear the loss."

² 53 Md. 564 (1880), holding also that the corporation was bound to take notice of the contents of the will—a position that is denied by the case of *Hutchins v. State Bank*, 53 Mass. 421 (1847). Where, however, the executrix has power given by the will to

apply the stock to her own use in case of need, the corporation is not bound to ascertain whether such a state of need exists. *Hutchins v. State Bank*, 53 Mass. 421 (1847). See also *Peck v. Providence Gas Co.*, 17 R. I. 275 (1892). Where the executors ask for a transfer of stock, but the company refuses on the ground that they have no power to transfer the same, and afterwards the executors declare in writing that the stock does not belong to the estate, the executors cannot hold the corporation liable for refusing to make the transfer as stated above. *Livezey v. Northern Pac. R. R.*, 157 Pa. St. 75 (1893).

³ *Weyer v. Second Nat. Bank*, 57 Ind. 198 (1877). A contrary view seems to be held in *Southwestern R. R. v. Thomason*, 40 Ga. 408 (1869). In Indiana, where an administrator cannot sell personal property except in a certain way, the corporation is liable to the estate if it allows a transfer of stock on its books under a sale by the administrator who has not complied with the law. The purchaser, however, who does not see the old certificates, but takes new certificates issued by the corporation, is protected. *Citizens' Street R'y v.*

to assume that the executor is transferring the stock for the purposes of the estate. It is not obliged to inquire into the purposes of the parties, nor to investigate whether the transaction is in good faith or is fraudulent,¹ nor to examine the will.²

Robbins, 128 Ind. 449 (1891). A sale of stock by an executor at private sale was sustained in *Wilson v. Central Bridge*, 9 R. I. 590 (1870), although the statute declares that executors should be liable for double the appraised value of the property if they sold at private sale. In *Citizens' Street R. R. v. Robbins*, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, inasmuch as the purchasing corporation had expressly assumed the liabilities of the vendor corpora-

tion, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer.

¹*Crocker v. Old Colony R. R.*, 137 Mass. 417 (1884). See also *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448 (1880); *Goodwin v. American Nat. Bank*, 48 Conn. 550 (1881).

²Although the administrator transfers the stock to the "heirs and distributees," the corporation is protected in issuing absolute certificates to such distributees, and is not bound to learn or know of a will to the effect that the distributee had only a life interest. *Smith v. Nashville, etc. R. R.*, 91 Tenn. 221 (1892).

CHAPTER XX.

SALES OF STOCK—THE FORMATION AND PERFORMANCE OF THE CONTRACT—GAMBLING SALES—FRAUDULENT SALES.

A. FORMATION AND PERFORMANCE OF CONTRACTS TO PURCHASE STOCK.

- § 331. Shares of stock are transferable.
332. Restrictions on right to sell stock and contracts against selling.
333. "Pools," "corners," and combinations in stock.
334. Contract for sale of stock may be valid without delivery or specific time for delivery — Construction of various contracts.
- 335, 336. Remedies for breach of a contract to sell stock — Tender.
- 337, 338. Specific performance as a remedy for breach of a contract to sell stock.
- 339, 340. Statute of frauds as affecting sales of stock.

B. GAMBLING SALES OF STOCK.

341. What are gambling sales of stock.
342. Statutes prohibiting wager contracts, and also certain stock contracts.

§ 343. Test of legality of stock transaction.

344. When intent to deliver is question for the jury and when not.
- 345, 346. Gambling stock contracts as affecting the relations between the principal and his broker.
- 347, 348. Gambling stock transactions as affecting notes, bonds, mortgages, etc., growing out thereof.

C. FRAUD AS AFFECTING A SALE OF STOCK.

349. Extent of subject treated herein.
350. What has been held to constitute a fraud herein.
351. Fraudulent sale by agent, etc., in breach of trust.
- 352, 353. Fraud may be by corporate reports or prospectus.
354. Remedies for the fraud.
355. Action for deceit.
356. Remedy in equity.
357. Fraud in selling stock may amount to a conspiracy.

A. FORMATION AND PERFORMANCE OF CONTRACTS TO SELL STOCK.

§ 331. *Shares of stock are transferable.*— That shares of stock in a corporation are transferable the same as other personal property is a principle of law coeval with the existence of stock itself. The few decisions holding that shares of stock were real estate were exceptional rulings, and are no longer considered to be good law.¹ Courts of law and of equity have guarded jealously the facilities for the transfer of title to stock, and all unreasonable attempts to restrain the right or readiness of passing title have been declared void as against public policy.

¹ See ch. I, *supra*.

The right to transfer stock is of vital importance, since the two chief causes of the phenomenal growth of corporations in recent times are the limited liability of the members and the readiness of withdrawing from the corporation by a transfer of the interest a member has therein. The common law regards shares of stock as personal property, capable of alienation or succession in any of the modes by which personal property may be transferred.¹

§ 332. *Restrictions on right to sell stock and contracts against selling.*—By-laws restricting the sales of stock and contracts against selling are generally made in connection with contracts for voting at elections so as to control the management of corporations. These two classes of contracts, to sell together and to vote together, are closely allied, and consequently are treated under the subject of "Elections," in another part of this work.²

§ 333. "*Pools*," "*corners*," and *combinations in stock*.—This subject also is closely connected with the subject of restrictions on the right to vote and pooling arrangements for the purpose of controlling elections, and consequently is considered elsewhere.³

§ 334. *Contract for sale of stock may be valid without delivery or specific time for delivery* — *Construction of various contracts.*—Generally a sale of stock is attended with an immediate delivery of the certificates therefor, or it is agreed that the certificates shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificates of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time, and either party may insist upon carrying out the contract.⁴ Where the

¹ *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558 (1873); *Cole v. Ryan*, 52 Barb. 168 (1868); *Heart v. State Bank*, 2 Dev. Eq. (S. C.) 111 (1831); *Allen v. Montgomery R. R.*, 11 Ala. 437, 451 (1847); *Boston Music Hall Assoc. v. Cory*, 129 Mass. 435 (1880); *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829); *Chouteau Spring Co. v. Harris*, 20 Mo.

382 (1855); *Poole v. Middleton*, 29 Beav. 646 (1861); *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196 (1836).

² See § 621a, *infra*.

³ See § 621b, *infra*.

⁴ "The performance of a contract, or the tender of performance, is no part of the contract. The making of a contract is one thing, but the per-

vendor says, in his contract, "I have sold" certain stock, deliverable at seller's option, within a specified time, a sale *in presenti* is made, and the vendor assumes to have the stock and to hold it for the benefit of the purchaser until delivery.¹ An agreement to purchase stock when the corporation is created is enforceable only after a complete and legal incorporation is effected.² A sale of stock with an agreement to take it back

formance thereof, or the tender of performance, is another and quite different thing. The contract set up in the paragraph in question is an executory one, by which the plaintiff agreed to sell to the defendant the shares of the stock, and the defendant agreed to pay him therefor the sum of \$25. No time was fixed for the performance; the law will imply, therefore, that it was to be performed immediately, or perhaps within a reasonable time. Had a future day been agreed upon for the performance of the contract on each side, there could have been no doubt as to its validity, or the right of either party to enforce it, he having done all he was required to do on his part. The fact that no time was agreed upon for performance does not change the character of the contract. The contract did not pass any title to the stock, but it was, nevertheless, a valid contract, and one which either party can enforce, he having been in no default himself." *Bruce v. Smith*, 44 Ind. 1 (1873); *Kerchner v. Gettys*, 18 S. C. 521 (1882); *Cheale v. Kenward*, 3 De G. & J. 27 (1858). Usage may determine what is a reasonable time for delivery. Seven days held reasonable. *Stewart v. Cauty*, 8 M. & W. 160 (1841). In a contract by which one "agrees to deliver" to the other certain stock at a certain price, performance is to be within a reasonable time, and the vendor may tender the stock and then sue for the price. *Boehm v. Lies*, 60 N. Y. Super. Ct. 436 (1892). Specific performance of a contract to sell stock will not be en-

forced, where the time of performance and of payment is not fixed, and where five years have elapsed, and where the vendee, the corporate secretary, misrepresented the value of the stock to the vendor. *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 (1889). An agreement to transfer stock at any time to a trustee for creditors is not enforceable against the insolvent estate of the deceased stockholder. *Chafee v. Sprague*, 16 R. I. 189 (1888). An offer to sell stock, with a statement that the stock could probably be sent with a draft, even when accepted with a direction to send it on, does not make a binding contract. *Topliff v. McKendree*, 88 Mich. 148 (1891). Where stock is sold on condition that the vendee shall be "in a position to take up the stock," the condition is fulfilled if the vendee accepts the stock and acts as a director, and holds the stock for five months. *Wills v. Fisher*, 112 N. C. 529 (1893).

¹ *Currie v. White*, 45 N. Y. 822 (1871). When the option is exercised, the time of delivery as fixed is as though that time had been specified in the original contract. *Kelley v. Upton*, 5 Duer, 336 (1856), holds otherwise where the contract has also the words "at buyer's option in ninety days." Such a contract is executory as to time of passing title, and tender is necessary.

² *Childs v. Smith*, 55 Barb. 45 (1869). If stock is sold conditionally, and the condition does not happen, the sale is void. *Mitchell v. Wedderburn*, 68 Md. 139 (1887).

whenever the vendee desires is an enforceable contract, even though the contract is oral.¹

Great difficulty often arises in determining whether a contract of sale of stock is an executed or is merely an executory contract of sale. There are a few general rules on this subject,² but each contract for the sale of stock is construed and enforced by the courts according to the intent of the parties as manifested by the written terms and conditions of the contract itself. Various contracts relative to the sale of stock are explained and referred to in the notes below.³

¹ See § 339, *infra*.

² A contract of sale of stock was worded as follows:

"I hold of the stock of the Washington and Hope Railway Company \$33,250 or 1,350 shares, which is sold to Paul F. Beardsley [the appellee], and which, though standing in my name, belongs to him, subject to a payment of \$8,000, with interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock."

The court held that this was an executed contract by which the ownership of the stock passed to the purchaser, with a reservation of title, simply as security for the purchase-money—an equitable mortgage. The court pointed out the difference between an executed and executory contract of sale as follows:

"If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed contract, a completed sale, then the moving party is the vendor, the security-holder, and he assumes all the burdens and risks of delay. . . . It is not always easy to determine whether an instrument is a contract of sale or one to sell;

yet certain rules of interpretation have become established. . . . Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." *Beardsley v. Beardsley*, 138 U. S. 262 (1891).

³ An offer to buy stock, open to acceptance after January 1, must be accepted before July 9. *Park v. Whitney*, 148 Mass. 278 (1889). An agreement of a party to sell bonds for another party at a certain price may be enforced by the party who is to give the bonds to the other party to sell. *Plumb v. Campbell*, 129 Ill. 101 (1888). The vendor may guarantee that the stock will be at par within a certain time. Suit lies if it is not at par within that time. *Hill v. Smith*, 21 How. 283 (1858). The fact that the corporation loses a large amount of money after a partner agrees to take stock as a part of his share of the partnership assets does not allow him to decrease the price which was estimated to be worth. *Donahue v. McCosh*, 70 Iowa, 733 (1886). Only a *de facto* corporation need be proved. *Reynolds v. Myers*, 51 Vt. 444 (1879). A contract guaranteeing a certain dividend over and above certain corporate expenses does not include

A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways, and the stock then to be returned, is a conditional sale and not a loan to the corpora-

payment of salaries, etc. *Central, etc. Assoc. v. James*, 81 Ga. 762 (1888). A guaranty upon the sale of stock that certain dividends will be declared is enforceable against the guaranteeing firm, even though they acted as agents for an undisclosed principal. Their obligation is primary, and not that of guarantors for the company. *Kernochan v. Murray*, 111 N. Y. 306 (1888). See also, as to guarantees, § 775, *infra*. The memoranda of the contract, together with the certificates of stock, are sufficient presumptive evidence of the existence of the corporation and the legal issue of the stock. *Mann v. Williams*, 143 Mass. 394 (1887). See also *Lindley, Partn.*, pp. 719, etc., 4th ed. (1881). Where stock is issued to a person for construction work, and he sublets the contract and agrees to divide the stock with others who are to share the expense of construction, they all are liable to the subcontractor. *McFall v. McKeesport, etc. Co.*, 123 Pa. St. 253 (1889). An option to purchase stock within three years is enforceable, though one party has an option which the other has not. *Seddon v. Rosenbaum*, 85 Va. 938 (1889). When a subscriber to stock agrees to sell \$5,000 worth of the same at its "original cost," such cost is the cost to the subscriber and not the par value, nor the cost including loans by the subscriber to the corporation. *Eagan v. Clasbey*, 5 Utah, 154 (1887). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. *Tilkey v. Augusta, etc. R. R.*, 83 Ga. 757 (1889).

A contract calling for "original,

ground-floor, or treasury stock" means any of the stock that is issued, where the statutes prohibit fictitious stock. All the stock is then presumed to be "ground-floor" stock and to represent at par the actual value received. *Williams v. Searcy*, 94 Ala. 360 (1891). A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another person cannot collect on such sale. *Williams v. Evans*, 87 Ala. 725 (1889). See ch. III, *supra*. An agency to sell the stock of a company refers to the stock then issued by the company. *Gates v. National, etc. Union*, 46 Minn. 419 (1891). An executory contract to purchase stock is not such a claim against the estate of an insolvent vendee as to be provable against the assignee. *Re Ives*, 11 N. Y. Supp. 650 (1890). A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation, the stock of which was sold, had agreed to acquire certain rights of way and had not done so. *Blagen v. Thompson*, 23 Oreg. 239 (1892). Where a vendor of stock, in addition to the price received, is to have an additional sum equal to the highest price paid to any others for their stock, he cannot recover such additional price by proof that the vendee, in order to stop a stockholder's suit, paid a higher price for other stock. *Stewart v. Huntington*, 124 N. Y. 127 (1890). An executory agreement by the holder of a note that he will cancel it in

tion.¹ Where a note is given in payment for stock, and recites on its face that it is for value received, parol evidence is not admissible to show that the sale was on condition that the stock would afterwards pay a certain dividend, and in case such dividend was not paid the note was not to be paid.² If a contract of sale is conditional on the stock being increased, and the vendor prevents such increase, the vendee is entitled to recover back a partial payment already made by him.³ Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the

payment for stock is a contract by itself, and is no defense to the note. It is not a satisfaction of the note nor a substituted contract. It may, however, give a right to damages. *Hayes v. Allen*, 160 Mass. 286 (1894). Where an employee is to receive certain stock if he remains in the employ of the company up to a certain date, a receiver of his property prior to that date cannot demand the stock prior to that date. *Delahunty v. Hake*, 10 N. Y. App. Div. 230 (1896). Where the vendors of stock guarantee that the stock shall be non-assessable until they have advanced \$30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the \$30,000. *Omo v. Bernart*, 65 N. W. Rep. 622 (Mich., 1895). The holder of an option, who thereafter takes the stock and agrees to pay for it or return it within a certain time, must pay for it if he keeps the stock beyond that time. *Stevens v. Hertzler*, 109 Ala. 423 (1896). An agreement to sell and deliver all the stock of a corporation within a certain time is valid even though the promisor does not own or control the stock. He may be sued for damages for a breach. *Wamsley v. H. L. Horton Co.*, 77 Hun, 317 (1894). Where in the sale of the stock of a street railroad a warranty is made that the liabilities of the company do not exceed a

certain sum, a note given in payment for the stock may be defeated if the liabilities exceed that sum. *Millsaps v. Merchants', etc. Bank*, 71 Miss. 361 (1893). Where the proposed seller offers to sell at a certain price, and the buyer accepts the offer payable on three days' sight draft, and on the next day the buyer asks for certain explanations before confirming his offer, the seller may refuse to carry out the sale. *Cameron v. Wright*, 21 N. Y. App. Div. 395 (1897). Where stock is placed in escrow to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. *Pabst, etc. Co. v. Montana, etc. Co.*, 48 Pac. Rep. 234 (Mont., 1897). Where upon the sale of stock it is placed in the hands of a third person to be delivered when paid for, and is partly paid for, it is conversion for the person so holding the certificates to deliver them to still another person on the order of the vendor. *Kahaley v. Haley*, 15 Wash. 678 (1896). Contracts whereby the vendor agrees to take the stock back within a certain time at the same price are considered elsewhere. See § 339, *infra*.

¹ *Crimp v. McCormick Const. Co.*, 71 Fed. Rep. 356 (1896).

² *Dinkler v. Baer*, 92 Ga. 432 (1893).

³ *Lovell v. Jacobs*, 150 N. Y. 84 (1896).

latter a fourth of stock which the former purchases in a mining company.¹ An option running to two persons cannot be exercised by one of them.² Where the vendor guarantees that the vendee can sell the stock within a year at a certain price, and the vendee sells it after the year at a less price, he may recover the difference from the vendor.³ Many cases are referred to in the notes below relative to the contracts and rights of agents, promoters, and partners in the purchase or sale of stock.⁴

§ 335. *Remedies for breach of a contract to sell stock—Tender.*—A person who is under contract to sell and deliver shares of stock may fulfill the obligation on his part by tendering to the vendee certificates of stock duly indorsed by himself, and

¹Dennison v. Chapman, 105 Cal. 447 (1895).

²Pratt v. Prouty, 73 N. W. Rep. 1035 (Iowa, 1898).

³Lobeck v. Duke, 70 N. W. Rep. 36 (Neb., 1897).

⁴For a sale of stock where the vendee was to divide with the vendor the amount for which the stock should be resold by the vendee, see Jones v. Kent, 80 N. Y. 585 (1880). An agreement to divide the profits on stock in consideration of information to be furnished is enforceable. Parsons v. Robinson, 59 N. Y. Super. Ct. 546 (1891); aff'd, 133 N. Y. 537. A contract whereby an agent, one of the partners, is to have half of what he could sell partnership shares of stock for, is legal and enforceable by him. Wight v. Wood, 85 N. Y. 402 (1881). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he have specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties; the value of the

stock can be estimated in damages; there was no allegation of defendant's insolvency, and the promoter has ample remedy at law for damages. Avery v. Ryan, 74 Wis. 591 (1889). A promise and contract of promoters to subscribers to certain bonds may create an equitable lien on the bonds enforceable in equity. Badgerow v. Manhattan Trust Co., 64 Fed. Rep. 931 (1894). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financed the matter for him was involved in Griggs v. Day, 58 N. Y. Super. Ct. 385 (1890). The fact that a vendee makes out a check to a person and delivers it to him in payment for stock does not prove that the latter is the vendor and liable for misrepresentations. Aron v. De Castro, 131 N. Y. 648 (1892). For a breach of an agreement to give a certain quantity of stock in payment for services to be performed, the person entitled to the stock may sue for damages. Alford v. Wilson, 20 Fed. Rep. 96 (1884). The corporation is not liable for the breach of an agreement among the organizers as to the distribution of stock. Summerlin v. Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890).

Where the promoters of a com-

containing a power of attorney authorizing the vendee to obtain a registry of the transfer on the corporate books.¹ If the vendor causes the stock to be transferred on the corporate books

pany agree to sell property to the company in consideration of a certain number of paid-up shares, specific performance may be had. See *Fyfe v. Swabey*, 16 Jur. 49 (1851), M. R. Cf. §§ 705-707, *infra*. Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. *Bates v. Wilson*, 14 Colo. 140 (1890). Where the owner of a patent agrees to convey it to a corporation for stock, and then to divide the stock with others, he may be compelled to perform his agreement. But where the patentee does not convey the patent to the corporation, but conveys to another corporation, the latter is protected in its title, though some of its incorporators and directors knew all the facts. *Davis, etc. Co. v. Davis, etc. Co.*, 20 Fed. Rep. 699 (1884). Where a patentee agrees with a promoter to sell the patent to the corporation for stock, and divide the stock with the promoter, but the patentee, after obtaining the stock, sells the certificates to a *bona fide* purchaser, the latter is protected, though the transfer is not registered on the corporate books. The purchaser may come into a suit instituted by the promoter against the corporation to compel a transfer. *Thurber v. Crump*, 86 Ky. 408 (1887). Where a person holds property in trust or as agent for others, and conveys that property to a corporation for its shares of stock, the persons who had an equitable interest in the property may compel this agent or trustee to transfer to themselves such stock. But all of the principals

or *cestuis que trust* must be made parties to the suit. *O'Connor v. Irvine*, 74 Cal. 435 (1887). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. *Johnson v. Brooks*, 46 N. Y. Super. Ct. 13 (1880); *Thornton v. St. Paul, etc. R'y*, 45 How. Pr. 416 (1873); S. C. dismissed, 6 N. Y. Week. Dig. 309 (1878). Equity has jurisdiction to compel the transfer of stock as between parties. Thus, where stock is issued in payment for property, and the party to whom the certificate is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division, and may enjoin any election of the corporation until such division is made. *Archer v. American, etc. Co.*, 50 N. J. Eq. 33 (1892). It is a question of fact whether a person selling stock is an agent or vendee of the person from whom he obtained the stock, and whether the latter is liable on misrepresentation made by such person. *Henneberger v. Matter*, 88 Mich. 396 (1891); *Florida, etc. Co. v. Merrill*, 52 Fed. Rep. 77 (1892). A party selling stock is not liable for the false representations of the vendee to another person to whom the vendee is reselling the stock. *Masterton v. Boyce*, 6 N. Y. Supp. 65 (1889).

¹ "When certificates of shares are given to a purchaser they are analogous to the sale of chattels, and the assignment and delivering of the certificate is a symbolical delivery of the shares themselves." *Noyes v. Spaulding*, 27 Vt. 420 (1855); *Duchemin v. Kendall*, 149 Mass. 171 (1889); *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454 (1879); *Eastman v. Fiske*, 9

to the vendee, this is sufficient.¹ A tender of a certificate indorsed in blank, not by the vendor, but by some previous owner, is insufficient. The vendee is not obliged to trace his vendor's title from the name appearing on the certificate.² A contract to buy stock in a West Virginia corporation cannot be enforced by tendering stock in a Connecticut corporation.³ An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.⁴ Tender need not be made where the ability to make a tender is shown, and the other party refuses to accept tender and denies the contract.⁵ In England, where a transfer of shares is to be made by a deed, it is the duty sometimes of the vendor,⁶ and sometimes of the vendee,⁷ to furnish the necessary deed, according to the custom of the market in which the sale is made. If, after the vendee accepts a tender of the certificates, the corporation refuses to allow a registry and transfer on the corporate books, the vendor is liable to him, since the registry is held to have

N. H. 182 (1838); *Munn v. Barnum*, 24 Barb. 283 (1857); *Bruce v. Smith*, 44 Ind. 1 (1873). *Cf.* *Moore v. Hudson River R. R.*, 12 Barb. 156 (1851). It is not a sufficient tender to deposit the certificates of stock with the clerk of the court unindorsed. Subsequent indorsement after the stock has been sold for non-payment of assessments is insufficient. *Kelley v. Owens*, 47 Pac. Rep. 369 (Cal., 1897). Where a firm contracts to sell stock, and then both members of the firm die, a tender of certificates standing in the names of the individual members of the firm, and not signed in blank, is not a sufficient tender. *Nicholls v. Reid*, 109 Cal. 630 (1895); *Holmes, etc. Manuf. Co. v. Holmes, etc. Metal Co.*, 53 Hun, 52 (1889); *aff'd*, 127 N. Y. 252.

¹ *White v. Salisbury*, 33 Mo. 150 (1862). See *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454 (1879).

² *Hare v. Waring*, 3 M. & W. 362, 380 (1838), per Parke, B. "The party is to convey and deliver certificates showing either on the face of them

or from the indorsements that the title is in the person conveying."

³ *Craig Silver Co. v. Smith*, 163 Mass. 263 (1895).

⁴ *McIlquoham v. Taylor*, [1895] 1 Ch. 53.

⁵ *Eames v. Haver*, 111 Cal. 401 (1896). Where the vendor delivers a part of the securities under a contract of sale, and the vendee retains the same and claims that they had always been his property, the vendor need not tender the remainder before suing for the purchase price, but is liable to the vendee for the part not so tendered. *Stokes v. Mackay*, 147 N. Y. 223 (1895). No tender of the stock need be made if the vendor repudiates the contract. *Maguire v. Halsted*, 18 N. Y. App. Div. 228 (1897). A tender may be waived. *Kuhn v. McKay*, 49 Pac. Rep. 473 (Wyo., 1897).

⁶ *Shaw v. Rowley*, 16 M. & W. 810 (1847).

⁷ *Stephens v. De Medina*, 4 Q. B. 423 (1843).

been guaranteed.¹ The vendee may decline to accept the certificates if the stock has been attached.² But the vendee cannot decline the tender on the ground that the corporation has issued stock at a discount, nor because it has mortgaged its property.³ A contract whereby stock is sold to be paid for in the future is not forfeited by mere failure to pay as agreed upon.⁴

¹ *Wilkinson v. Lloyd*, 7 Q. B. 27 (1845).

² *Eastman v. Fiske*, 9 N. H. 183 (1838).

³ *Noyes v. Spaulding*, 27 Vt. 420 (1855). See also § 349, etc., *infra*.

⁴ *Chater v. San Francisco, etc. Co.*, 19 Cal. 219 (1861), where payment was made in notes and labor, and the notes were not paid. Subsequent dividends on the stock are to be applied to the payment of such notes when the dividends have been received by the vendor. A sale of stock to take effect when a note given in payment is paid does not enable the vendee to claim the stock long subsequently, the note not having been paid. *Davidson v. Davis*, 125 U. S. 90 (1888). Where, however, two parties, one owning stock, the other bonds, contract to exchange the same, delivery being in escrow at once, and absolutely after the performance of certain things, a failure of one party to perform on his part enables the other to have the contract canceled by a court of equity. *Wilson v. Roots*, 119 Ill. 379 (1887). Where fifty shares of stock are sold, but only twenty-five shares are delivered, and the vendor declines to deliver the balance, a suit by the vendor on the ground of fraud and a rescission will fail. *Matthews v. Cady*, 61 N. Y. 651 (1875). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. *American Water-works Co. v. Venner*, 18 N. Y. Supp. 379 (1892). Where the owner of a majority of the stock sells it, the purchase

price being only paid in part, and retains the stock in his own name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments, even though the vendee has proceeded to improve the property. *Stockton v. Russell*, 54 Fed. Rep. 224 (1892). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. *Coffin v. State*, 144 Ind. 578 (1896). A company may give a person an option to subscribe for shares of stock in the company. If the company sells its assets before such option is exercised, the party holding the option may exercise it and sue for damages. The price at which the company sold its assets is the basis of the damage. *Re South African, etc. Co.*, 74 L. T. Rep. 769 (1896). A person who contracts to sell to another, on or before three years from date, certain stock at a certain price, interest to be paid by the vendee in the meantime, and the stock to be deposited in escrow, cannot recover the price at the end of the three years if he has not deposited the stock in escrow as agreed. *Umfried v. Brooks*, 14 Wash. 675 (1896). An agreement of a stockholder that if he sells a certain amount of his stock he shall sell to another stockholder his remaining stock does not

A person who is under contract to purchase stock cannot defeat that contract by the fact that the corporation was insolvent, at the time the contract was entered into.¹ An agreement to deliver stock free and clear of all incumbrances does not refer to incumbrances against the corporation.² The legality of the sale of stock is governed by the law of the state within which it is made.³ It is no defense to a contract to buy stock for the vendee to allege that the directors have committed an *ultra vires* act in issuing more stock at a discount.⁴

§ 336. Difficulty is often experienced in determining what the measure of damages is for breach of a contract relative to the sale of stock. In certain cases, where the stock has been delivered or tendered, the measure of damages is the purchase price fixed by the contract itself.⁵ The vendor may tender the

apply where he transfers only a portion of the first-mentioned stock. *Burden v. Burden*, 8 N. Y. App. Div. 160 (1896).

¹ *Rudge v. Bowman*, L. R. 3 Q. B. 689 (1868); *Gordon v. Parker*, 10 La. 56 (1836), where the question of whether fraud was involved was submitted to the jury. See §§ 349 *et seq.*, *infra*. *Crabb v. Miller*, 19 W. R. 519 (1871), where by reason of a winding up a transfer on the corporate books was no longer possible; *Kerchner v. Gettys*, 18 S. C. 521 (1882), holding that a loss by the corporation of its property is no defense. Damages cannot be recovered for the breach of an executory contract to purchase stock, if at the time of making the contract the corporation had been dissolved and the purchaser was not aware of that fact. *Kip v. Monroe*, 29 Barb. 579 (1859).

² *Williams v. Hanna*, 40 Ind. 535 (1872).

³ *Dow v. Gould, etc. Co.*, 31 Cal. 629, 653 (1867).

⁴ *Faulkner v. Hebard*, 26 Vt. 452 (1854). That fraud is a defense, see §§ 349–357, *infra*.

⁵ Where the stock is sold to be delivered thereafter, and the vendee

refuses to accept the stock, the vendor may tender the stock and then sue for the contract price. In *Mobley v. Morgan*, 6 Atl. Rep. 694 (1886), the court said: "The court refused to instruct the jury that it was necessary for Morgan to sell the stock on the market for the best price he could get, and that the measure of damages would be the difference between the price thus obtained and the contract price; and this refusal is assigned for error. Of course, the seller would be at liberty, after tender and refusal, to adopt this course; but it was not essential to his right of action. The measure of damages was the difference between the market price of the stock at the time of the breach and the contract price. This is the ordinary rule; but there was evidence that the stock had no value, and there is no certainty — indeed, no proof — that upon a resale any price could have been obtained for the stock, or that it had any market value when Parker finally refused to take it. Under these circumstances we see no reason why the price agreed to be paid should not be adopted as the measure of damages, if that was the

stock to the vendee and sue for the price, or may sell after notice to the vendee and then sue for the difference, or may retain the stock and sue for the difference between the contract

only mode by which full compensation could be made for the breach of contract by the purchaser."

In *Barnes v. Brown*, 130 N. Y. 372 (1892), the court said: "In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation." As to the remedies for a breach, see also *Benjamin on Sales*. For the measure of damages, see ch. XXXV, *infra*. As regards the pleadings in an action by a vendor of stock to recover damages against the vendee for refusal to accept and pay for stock which the latter had agreed to accept at a stated price, one year from date, if the former desired to sell, see *Struthers v. Drexel*, 122 U. S. 487 (1887). The vendor may claim damages for a breach, in that the vendee does not pay the contract price and take the stock, or he may bring an action "in effect for the specific performance thereof," in which case he must allege readiness to deliver the stock. *Corning v. Roosevelt*, 11 N. Y. Supp. 758 (1890). For breach the vendor may tender the stock and then sue for the entire price. The judgment will allow the vendor to retain the stock until the judgment is satisfied. *Finlayson v. Winan*, 84 Hun, 357 (1895). Where the vendee agrees to give a note and the stock as collateral, but gives the note only, the vendor may return the note and sue at once for the price. *Rennyson v. Reifsnnyder*, 1 Pa. Dist. Rep. 758 (1892). The court will compel the vendee to take and pay for stock where it would

compel the vendor to deliver the stock if he defaulted on the contract to sell. *Bumgardner v. Leavitt*, 35 W. Va. 194 (1891). Where the vendor gets judgment for the price of the stock sold but not delivered, the court will order him to deposit the stock with the court or lose his judgment. *McKeever v. Dady*, 18 N. Y. Supp. 439 (1892).

In *Perin v. Megibben*, 53 Fed. Rep. 86 (1892), the court granted specific performance of a contract to sell stock in behalf of the vendor and against the vendee. The court said: "The agreement was in form a contract to buy all the shares of stock in the incorporated companies. The language of the contract shows that the real agreement was to buy certain real estate, together with the personal property connected with its use for milling and distilling purposes. Without discussing the question whether the sale of shares of stock can be specifically enforced in equity, it is sufficient to say that the sale here was in fact a sale of real estate, and the circumstance that personality was included in the sale would not affect the power of a court of equity to afford relief by requiring specific performance." The measure of damages for breach of a contract to purchase stock is the difference between the contract price and the market value of the stock at the time and place of delivery, with interest. *Corser v. Hale*, 149 Pa. St. 274 (1892). Where a vendee refuses to carry out an executory contract for the sale of shares, the measure of damages is the difference between the price as fixed by the contract and the value of the stock at the time of tender and refusal of the vendee to fulfill. See *Barned v. Hamilton*, 2 R'y & Canal

and market price.¹ The statute of limitations may be a bar to the action.²

The vendee's remedy for a failure on the part of the vendor to deliver is an action for damages³ or a bill in equity to obtain

Cas. 624 (1841); *Tempest v. Kilner*, 3 C. B. 249 (1846), and *Stewart v. Cauty*, 8 M. & W. 160 (1841); *Shaw v. Holland*, 15 M. & W. 136 (1846). If a person sells and conveys property to a company to be paid for in stock, which the vendee refuses to deliver, the vendor may recover the value of the stock. *Humaston v. Telegraph Co.*, 20 Wall. 20 (1873). Where an agent to sell stock is to have any excess of price over a sum named to him by the vendor, and the agent finds a customer at an advanced price and the vendor refuses to sell, the agent may recover such profit as he lost thereby. *Mattingly v. Roach*, 84 Cal. 207 (1890). See also, as to agents, § 334, *supra*.

¹See the cases in the preceding note. The vendor's remedies for a breach of a contract to buy stock are: (1) To hold the stock for the vendee and require payment of the entire price; (2) to sell after notice to the vendee and sue for the difference between the contract price and the selling price; (3) to retain the stock and sue for the difference between the contract price and the market value price. *In re Ives*, 11 N. Y. Supp. 650 (1890). No tender is necessary when the suit is for damages and the vendor intends to retain the stock. *Nysewander v. Lowman*, 124 Ind. 584 (1890). When suit is brought to recover the price of stock sold, a delivery or tender must be shown. *Holmes, etc. Co. v. Morse*, 53 Hun, 58 (1889). Where a party is sued on a note he may recoup by setting up that the note was given to plaintiff on plaintiff's agreement to assign and deliver certain shares of stock, which was not tendered

until eight months after the time agreed upon. *Hill v. Southwick*, 9 R. I. 299 (1869). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. *Coffin v. State*, 144 Ind. 578 (1896).

²The statute of limitations runs against a receipt reciting a first payment of stock "standing in my name but owned by him, and he remaining responsible for the balance of the instalments when called in," there being no agreement as to the future disposition of the stock and of dividends. *Cone v. Dunham*, 59 Conn. 145 (1890). A sale of a certificate to the effect that when stock is issued a specified amount will be issued to the holder is a valid sale and is not defeated by the statute of limitations. *Meehan v. Sharp*, 151 Mass. 564 (1890). Where certain owners of stock place it in the hands of a trustee for sale and the trustee invites subscriptions thereto, the subscription contract providing for payment of one-third down and the balance when called for, the statute of limitations is no bar to an action for the two-thirds, although six years have elapsed since the first payment was made. *Williams v. Taylor*, 120 N. Y. 244 (1890).

³A person entitled by contract to purchase stock of another may collect damages against the latter for failure to comply with the terms of the agreement. *Rand v. Wiley*, 70

specific performance.¹ In almost all cases, however, his remedy is an action for damages only, inasmuch as specific performance of a sale of personalty is rarely granted.

§ 337. *Specific performance as a remedy for breach of a contract to sell stock.*—It frequently happens that the person who has contracted to purchase stock is particularly anxious to procure that stock, and that, under the circumstances of the case, the stock is worth to him a value not to be compensated for by mere money damages. This cannot happen in the case of a contract to sell securities issued by the government, since they may be easily purchased in the market. Accordingly it is well established, both in England and America, that a contract for the sale of government securities will not be specifically enforced by a court of equity, but the vendee may sue the vendor in an action at law for damages for breach of contract.²

§ 338. An entirely different rule prevails as regards contracts for the sale of stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is

Iowa, 110 (1886). Where a person is paid for stock and fails to deliver, the measure of damages for a breach of the contract is what it would cost the party to purchase the stock which he is entitled to. If he cannot purchase it, then the par value of the stock is the measure of value, inasmuch as he would have had to pay that to the corporation in order to have had the stock issued to him. *Barnes v. Seligman*, 55 Hun, 339 (1890). Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damages for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the

stock. *Barnes v. Brown*, 130 N. Y. 372 (1892). Where the vendor of stock is unable to obtain the stock for delivery by reason of an injunction against the corporation, the vendee may sue for the return of the purchase-money. *Rose v. Foord*, 96 Cal. 152 (1892). That damages are a sufficient remedy, see 1 *University Law Rev.* 218 (1894).

¹ See next section.

² *Ross v. Union Pac. R'y*, Woolw. 26, 32 (1863); S. C., 20 Fed. Cas. 1245, 1247; *Cud or Cuddee v. Rutter*, 1 P. Wms. 570 (1719); S. C., 5 Vin. Abr. 538 (1720); *Dorison v. Westbrook*, 5 Vin. Abr. 540 (1722); *Cappur v. Harris*, Bunb. 135 (1723); *Buxton v. Lister*, 3 Atk. 383 (1746). Cf. *Doloret v. Rothschild*, 1 Sim. & S. 590 (1824); *Colt v. Nettervill*, 2 P. Wms. 304 (1725). See also 78 L. T. Rep. 426 (1898).

some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock.

This rule, as applicable to contracts for the sale of railway stock, was clearly established in England in 1841, in the case of *Duncuft v. Albrecht*.¹ Contracts for the sale of stock in mining and other private corporations will also be specifically enforced under some circumstances.²

¹ 12 Sim. 189 (1841); *Parish v. Parish*, 32 Beav. 207 (1863), granting also an accounting of dividends; *Poole v. Middleton*, 29 Beav. 646 (1861); *Turner v. Moy*, 32 L. T. Rep. 56 (1875); *Beckitt v. Bilbrough*, 8 Hare, 188 (1850), dictum. *Contra*, dictum in *Ross v. Union Pacific R'y*, Woolw. 26, 32 (1863); S. C., 20 Fed. Cas. 1245, 1247, per Miller, J. In *Cheale v. Kenward*, 3 De G. & J. 27 (1858), the court said: "There is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by *Duncuft v. Albrecht*, 12 Sim. 189 (1841)." In *Leach v. Fobes*, 77 Mass. 506 (1858), specific performance of a contract to convey land and stock was granted chiefly because of the land part of the contract. *Todd v. Taft*, 89 Mass. 371 (1863), decreed specific performance of contract to convey railway shares. See also *Baldwin v. Commonwealth*, 11 Bush (Ky.), 417 (1875); *Ashe v. Johnson*, 2 Jones, Eq. (N. C.) 149 (1855). As to when specific performance of a contract to sell stock will be specifically enforced, see also 1 *White & T. Lead*. Cas. 914-923, etc. As to possibility of mandatory injunction, see authorities in *High on Injunctions*.

² *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390 (1863). Specific performance of a contract to sell stock may be had where its value is not easily ascertainable. *Manton v. Ray*, 18 R. I. 672 (1894). See also *Frue v. Houghton*, 6 Colo. 318 (1882), and § 61,

supra. As applicable to manufacturing corporations, see *Chater v. San Francisco, etc. Co.*, 19 Cal. 219 (1861). Granted in a towboat association case in *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300 (1865). Refused in the case of stock in a land association. *Jones v. Newhall*, 115 Mass. 244 (1874). And in a paper company. *Noyes v. Marsh*, 123 Mass. 286 (1877). See *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879). "While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy." This case, however, is not a case of specific performance of a sale of stock, but of compelling the corporation to register a transfer. See also, in general, *Austin v. Gillaspie*, 1 Jones, Eq. (S. C.) 261 (1854); *Nutbrown v. Thornton*, 10 Ves. Jr. 160 (1804); *Shaw v. Fisher*, 5 De G., M. & G. 596 (1855); *Wynne v. Price*, 3 G. & Sm. 310 (1849); *Wilson v. Keating*, 7 W. R. 484 (1859); *Oriental, etc. Steam Co. v. Briggs*, 2 Johns. & H. 625 (1861); *Paine v. Hutchinson*, L. R. 3 Eq. 257 (1866); *Shepherd v. Gillespie*, L. R. 5 Eq. 293 (1867); *Birmingham v. Sheridan*, 33 Beav. 660 (1864); *Strasburg R. R. v. Echternacht*, 21 Pa. St. 220 (1853); *Fallon v. Railroad Co.*, 1 Dill. 121 (1871); S. C., 8 Fed. Cas. 977. In regard to a specific performance of a trust of stock, see *Ferguson v. Paschall*, 11 Mo. 267

Specific performance is often granted as between several parties each of whom is entitled to a certain part of stock which is received by or held in the name of one of them. A court will compel him to distribute the stock in accordance with the

(1848); *Cowles v. Whitman*, 10 Conn. 121 (1834); *Clark v. Flint*, 39 Mass. 231 (1839); *Mechanics' Bank v. Seton*, 1 Pet. 299 (1828); *Gage v. Fisher*, 5 N. Dak. 297 (1895). Specific performance of a contract to sell stock will be decreed where the stock has no recognized market value, and cannot be bought in the market. *Goodwin, etc. Co.'s Appeal*, 117 Pa. St. 514 (1888). Specific performance was refused in *Eckstein v. Downing*, 64 N. H. 248 (1886), there being no evidence that the vendee had any wish or reason for wishing to own that particular stock or stock in that particular corporation. See also *Cruse v. Paine*, L. R. 6 Eq. 641 (1868). Where a stockholder, who is also a director, contracts to give a person a certain amount of stock if he will do certain work for the corporation, and the board of directors, including this director, discharge such person without cause, and thus prevent completion, a court of equity will compel a delivery of the stock. *Price v. Minot*, 107 Mass. 49 (1871). In suits in equity to compel a transfer of stock, parties interested by a purchase from the defendant should be brought in. *O'Connor v. Irvine*, 74 Cal. 435 (1887). Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate—a distillery—and the real transaction is a sale of the entire property. *Megibben v. Perin*, 49 Fed. Rep. 183 (1892). Specific performance will not be decreed where there is doubt both as to the contract actually being made and as to the consideration, one party being dead. *Hibbert v. Mackinnon*, 79 Wis. 673 (1891). Where a debtor

agreed to transfer stock as collateral security for a debt, and died insolvent before doing so, the court refused to enforce specific performance of the agreement to the injury of other creditors. *City F. Ins. Co. v. Olmstead*, 33 Conn. 476 (1866). In general, see also *Stevens v. Wilson*, 18 N. J. Eq. 447 (1867). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. *Shepard v. Stockham*, 45 Kan. 244 (1891).

Where a person claims that he has a contract for the purchase of stock which the stockholder vendor is about to sell or has already sold to others, and the first-named person brings a suit in equity to obtain the stock, he must show, first, that it is a case for specific performance; and second, that the stock was impressed with a trust, and that the last purchaser took with notice of that trust. See 1 *White & T. Lead. Cas.* 914, 919, and *Pooley v. Budd*, 14 Beav. 34, 43, 44 (1851).

Lindley on Company Law (5th ed.) states the rule as follows: "A contract for the sale of shares by one individual to another is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company, and Lord Romilly refused to decree specific performance of a contract of this kind, on the ground that the decree would be ineffectual, as the shares might be transferred immediately after the contract was performed. *Sheffield Gas, etc. Co. v. Harrison*, 17 Beav. 294 (1853); *Bluck v. Mallalue*, 27 Beav. 398 (1859); *Columbine v. Chichester*, 2 Ph. Ch. 27 (1846). . . . In this last case there

contract. Such cases arise often in "pools" of stock, and in selling property to the company in consideration of stock and in buying stock in the names of other persons or agents. Thus, where parties to a construction contract agreed to divide the stock in a certain way, a court of equity will grant specific per-

were circumstances to show that specific performance was impossible." Page 586.—"In order that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (which it was not in *Oriental, etc. Co. v. Briggs*, 4 De G., F. & J. 191—1861), and be untainted by fraud (which was not the case in *New Brunswick, etc. Co. v. Muggeridge*, 4 Drew. 686—1859, and 1 Drew. & Sm. 363; or in *Maxwell v. Port Tenant, etc. Co.*, 24 Beav. 495—1858), or unfairness (as to agreements between co-directors, see *Flanagan v. Great Western R'y*, L. R. 7 Eq. 116—1868), and be capable of being performed by the defendant (*Ferguson v. Wilson*, L. R. 2 Ch. App. 77—1866; *Columbine v. Chichester*, 2 Ph. Ch. 27—1846), and not involve any breach of trust (*Fry, Sp. Perf.*, p. 177, 2d ed.; and see *Flanagan v. Great Western R'y*, L. R. 7 Eq. 116—1868), or performance by either party of obligations the performance of which a court cannot practically enforce (*Flanagan v. Great Western R'y*, 7 Eq. 116—1868; *Stocker v. Wedderburn*, 3 K. & J. 393—1857)." Page 587.—"An action will lie for specific performance of a contract for the purchase and sale of shares, if it is capable of being performed (see as to this, *Birmingham v. Sheridan*, 33 Beav. 660—1864, and compare *Poole v. Middleton*, 29 Beav. 646—1861); . . . and the purchaser will be compelled to pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid (*Wilson v. Keat-*

ing, 27 Beav. 121, and 4 De G. & J. 588—1859). The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that *he* had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed; and will be compelled to accept a transfer of the shares he has bought and to indemnify the seller from all liabilities accruing subsequently to the sale (*Wynne v. Price*, 3 De G. & S. 310—1849). As to the right of a mortgagee of shares to an indemnity from his mortgagor, see *Phené v. Gillan*, 5 Hare, 1—1845; and the seller will be compelled to account for any moneys he may have received from an improper subsequent sale to another person (*Beckitt v. Billbrough*, 8 Hare, 188—1850). The court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them (*Jackson v. Cocker*, 4 Beav. 59—1841. Compare this with the last case); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (*Sheffield, etc. Gas Co. v. Harrison*, 17 Beav. 294—1853); and to compel the promoters of a company to deliver shares to a subscriber to the company (*Columbine v. Chichester*, 2 Ph. Ch. 27—1846). In this case, however, the promoters did not appear to have any shares which they could allot). Neither will the court interfere to compel the completion of a gratuitous and intended transfer (see *Milroy v. Lord*, 4 De G., F. & J. 264—1862)." — Pages 499, 500.

formance and order transfers of the stock, it having no market value and the remedy at law being inadequate.¹

Specific performance may also be said to be granted where a corporation is ordered by a court to issue certificates of stock to its stockholders.²

Specific performance will not be granted, however, where the purpose of the purchaser of stock is to obtain control of a national bank, when the change in management would probably be to the detriment of the bank.³ Where the vendor's contract is to deliver stock and construct a railway, the court will not decree specific performance, since part of the contract is never the subject of such compulsory performance.⁴ Specific performance of a contract to deliver bonds will not be granted where the party seeking performance is not himself able to fully perform.⁵ A vendor cannot have specific performance where he had told the vendee that a certain person of responsibility had offered a higher price for the stock, when in fact such person, after making the offer, had investigated and then had withdrawn the offer.⁶ If the vendor is not in possession of the desired stock, specific performance will not be granted,⁷ except to the amount of stock which he has.⁸ But where a person, who is under contract to deliver certain stock, gives the stock to a relative for nothing, the party entitled to the stock by contract may compel such relative to give up the stock.⁹

¹ *Krohn v. Williamson*, 62 Fed. Rep. 869 (1894); *aff'd*, 66 Fed. Rep. 655. See also §§ 333, 334, *supra*, and § 705, *infra* and 50 N. E. Rep. 648.

² See § 61, *supra*, and § 766, *infra*, relative to contractors.

³ *Foll's Appeal*, 91 Pa. St. 434 (1879), the court saying: "I know of no instance in this state in which a court of equity has decreed specific performance of a sale of stock."

⁴ *Ross v. Union Pac. R'y*, Woolw. 26 (1863), per Miller, J.; S. C., 20 Fed. Cas. 1245. The court will not decree specific performance of a contract of a company to deliver its stock to a constructor of its road, even though the latter, the complainant, is willing to perform. The court cannot compel the latter to perform, and

hence will not tie up the stock of the former. *Peto v. Brighton, etc. R'y*, 1 Hem. & M. 468 (1863).

⁵ *Stokes v. Stokes*, 148 N. Y. 708 (1896).

⁶ *Moline Plow Co. v. Carson*, 72 Fed. Rep. 387 (1895).

⁷ *Columbine v. Chichester*, 2 Ph. Ch. 27 (1846). Specific performance as to issuing stock is not decreed when performance is impossible. *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep. 249 (1890). An injunction against a transfer in the meantime may be granted. *Ruttman v. Hoyt*, N. Y. L. J., July 19, 1890.

⁸ *Turner v. Moy*, 32 L. T. Rep. 56 (1875).

⁹ *Graham v. O'Connor*, 73 L. T. Rep. 712 (1896).

Although a court of equity refuses to grant specific performance, yet it will not always send the party to a court of law, but in some of the states will grant him damages.¹ Where a vendee of stock seeks specific performance he must tender the price, and cannot first demand that the stock be deposited in a bank.² In a suit for specific performance of a sale of stock, the complaining vendee may have a preliminary injunction against the vendor's selling to others.³ Where a vendee of stock brings action for a specific performance, and obtains judgment, the judgment should be in the alternative, either for the stock or for damages specified in the decree.⁴ In a suit by a claimant of stock to obtain the stock from another person, the corporation is a proper but not a necessary party.⁵ But in a suit to compel a corporation to transfer to the plaintiff stock standing on its books in the name of a third person, the corporation and the third person are both necessary parties.⁶ Laches may constitute a bar to the bill in equity to enforce specific performance.⁷ Where a person claims to hold stock in a corporation,

¹ *Wonson v. Fenno*, 129 Mass. 405 (1880). *Cf. Austin v. Gillaspie*, 1 Jones, Eq. (N. C.) 261 (1854).

² *Wescott v. Mulvane*, 58 Fed. Rep. 305 (1893), holding also that if the vendee, after obtaining an injunction against a sale of the stock by the vendor to others, withdraws his demand for specific performance and asks merely for damages, the injunction will be dissolved.

³ *McLure v. Sherman*, 70 Fed. Rep. 190 (1895).

⁴ *Eastman v. Reid*, 101 Ala. 320 (1893).

⁵ *Williamson v. Krohn*, 66 Fed. Rep. 655 (1895); *Johnson v. Kirby*, 65 Cal. 482 (1884), and see § 361, *infra*, and § 3, *supra*. The corporation is a proper but not a necessary party to an action by one person to compel another person to transfer stock to him in accordance with the contract. *Sayward v. Houghton*, 82 Cal. 628 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois in whose name the

stock stands on the corporate books, the corporation is a necessary party defendant and the case cannot be removed to the federal courts. *Rogers v. Van Nortwick*, 45 Fed. Rep. 513 (1891). The corporation is a proper party defendant. *Kendig v. Dean*, 97 U. S. 423 (1878); *Budd v. Munroe*, 18 Hun, 316 (1879); *Crump v. Thurber*, 115 U. S. 56 (1885). The reason of this rule is that complete possession of the stock can be obtained only by obtaining a transfer of that stock on the corporate books to the plaintiff.

⁶ *St. Louis, etc. R'y v. Wilson*, 114 U. S. 60 (1885).

⁷ Seven years' delay in bringing suit for specific performance is a bar. *York v. Passaic, etc. Co.*, 30 Fed. Rep. 471 (1887). Five years' delay held fatal where "the relations of the parties have changed and the stock has greatly appreciated in value." *Mundy v. Davis*, 20 Fed. Rep. 353 (1884). Where a person sells stock to be delivered within a reasonable time, and receives the money for it, but is un-

as against another person, and sues the corporation without joining the second claimant, the latter is not bound by the judgment, even though he is notified of the suit, it appearing that he was not allowed to take part in the trial.¹ A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.² Where, pending an appeal from a decree ordering a person to turn stock over to another, the former pays assessments on the stock, he cannot recover these assessments from the latter if the decree is affirmed.³

§ 339. *Seventeenth section of statute of frauds as affecting sales of stock.*—In England the rule is firmly established that the seventeenth section of the statute of frauds, relating to contracts for the sale of “goods, wares, and merchandise,” does not apply to sales of stock. No delivery, payment of earnest money, or memorandum in writing is necessary in order to render the contract of sale valid. This principle of law was doubted in the early cases,⁴ but was determined by the case of *Humble v. Mitchell*, in 1839.⁵ In 1838 this question arose in this country, apparently for the first time, and it was decided in *Tisdale v.*

able to perform his contract by reason of an injunction, the statute of limitations begins to run from the vendee's demand for the return of the purchase-money. *Rose v. Foord*, 96 Cal. 154 (1892). Three years' delay in bringing action for specific performance, the stock in the meantime having increased tenfold in value, is fatal. *Rogers v. Van Nortwick*, 87 Wis. 414 (1894). A court of equity may enforce a written agreement for the delivery of stock. A court of equity has jurisdiction although the party who contracted to deliver the stock has disposed of the stock for cash. The lapse of time is no bar to the suit, there being a complete breach of trust, unless such lapse is exceptionally great, the facts having been concealed. *Wood v. Perkins*, 57 Fed. Rep. 258 (1893).

¹ *Fifth, etc. Society v. Holt*, 39 Atl. Rep. 293 (Pa., 1898).

² *Ryan v. Seaboard, etc. R. R.*, 83 Fed. Rep. 889 (1897). See §§ 12, 361.

³ *Irvine v. Angus*, 84 Fed. Rep. 127 (1897).

⁴ *Mussell v. Cooke*, Finch's Prec. in Ch. 533 (1720), holding that the statute applied, but was not properly pleaded; *Pickering v. Appleby*, 1 Com. Rep. 353 (1721), not decided, the judges being divided six and six; *Colt v. Netterville*, 2 P. Wms. 304 (1725), not decided, the lord chancellor saying it was too difficult to decide on a demurrer; *Crull v. Dodson*, Sel. Cas. Ch. t. King (2d ed., p. 113—1725), statute held to apply.

⁵ 11 A. & E. 205, followed in *Duncuft v. Albrecht*, 12 Sim. 189 (1841), the court saying that the statute applies only to goods capable of part delivery; *Hibblewhite v. McMorine*, 6 M. & W. 200, 214 (1840); *Tempest v. Kilner*, 3 C. B. 249 (1846); *Heseltine v. Siggers*, 1 Exch. 856 (1848).

Harris,¹ chiefly on the authority of the early English cases, that a contract for the sale of stock was within the seventeenth section of the statute of frauds. This decision has been uniformly followed in America.²

A broker, however, as a common agent, may make the memorandum for both parties.³ A part payment of the consideration makes the contract valid,⁴ and a payment in property⁵ or services⁶ suffices. The usual transfer on the back of a certificate

¹ 37 Mass. 9.

² *Baltzen v. Nicolay*, 53 N. Y. 467 (1873), rigidly applying the rule; *North v. Forest*, 15 Conn. 400 (1843), where the court say: "Such contracts fall clearly within the mischiefs which the legislature by the statute intended to remedy. There is as much danger of fraud and perjury in the parol proof of such contracts as in any other;" *Pray v. Mitchell*, 60 Me. 430 (1872); *Fine v. Hornsby*, 2 Mo. App. 61 (1876); *Colvin v. Williams*, 3 Har. & J. (Md.) 38 (1810); *Sherwood v. Tradesman's Nat. Bank*, 16 N. Y. W. Dig. 522 (1883); *French v. Sanger*, N. Y. L. J., July 22, 1892. *Cf. Brownson v. Chapman*, 63 N. Y. 625 (1875). *Contra*, dictum, *Vawter v. Griffin*, 40 Ind. 593, 602 (1872). See *Reed*, Stat. of Frauds, § 234; *Hagar v. King*, 38 Barb. 200 (1862), holding that the sale of railroad bonds is within the statute. A subscription for stock is not a contract for the sale of goods, etc., within the meaning of the statute of frauds. *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893). In Florida the statute applies, the word "personal" property being used. *Southern Life Ins. Co. v. Cole*, 4 Fla. 359, 378 (1852). See also *Mason v. Decker*, 72 N. Y. 595 (1878), affirming 10 Jones & S. 115; *Johnson v. Mulry*, 4 Rob. (N. Y.) 401 (1867), holding that the New York Stock Jobbing Act (Laws N. Y. 1858, ch. 134) did not affect the application of the statute of frauds. The statute is not sufficiently pleaded by alleg-

ing that the contract of sale of stock "was void in law and not binding upon him." *Vaupell v. Woodward*, 2 Sandf. Ch. 143 (1844). The question of whether there was a delivery sufficient to take a case of sale of stock out of the statute of frauds was submitted to the jury in *Hinchman v. Lincoln*, 124 U. S. 38 (1888), discussed in N. Y. D. Reg., Jan. 28, 1888. A contract to sell stock at the vendee's option within three years is not void by the statute of frauds, since the option may be exercised within a year. *Seddon v. Rosenbaum*, 85 Va. 928 (1889). Without a memorandum in writing a contract for the sale of stock is not enforceable, although made in the Stock Exchange, whose rules provide that the contract shall be enforceable. *Ryers v. Tuska*, 14 N. Y. Supp. 926 (1891). A subscription payable when the road reaches a certain point becomes absolutely payable then upon demand. The statute of frauds does not apply to such a subscription. *Webb v. Baltimore, etc. R. R.*, 77 Md. 92 (1893).

³ *Colvin v. Williams*, 3 Har. & J. (Md.) 38 (1810).

⁴ *Thompson v. Alger*, 53 Mass. 428 (1847). A check is a part payment, taking a sale of stock out of the statute of frauds. *McLure v. Sherman*, 70 Fed. Rep. 190 (1895).

⁵ *Eastern R. R. v. Benedict*, 76 Mass. 212 (1857).

⁶ *White v. Drew*, 56 How. Pr. 53 (1878), holding that the furnishing of reliable information is sufficient.

of stock, when signed by the stockholder, is sufficient to satisfy the statute of frauds.¹ The statute does not apply as between partners for the purpose of buying stock.² A contract for the sale of stock in a corporation not yet incorporated has been held not to be within the statute.³ The statute must be pleaded in order to be effectual as a defense.⁴ The assignee of a contract for the sale of stock, void by the statute of frauds, takes nothing by the assignment.⁵ An agreement by the vendor of stock to take it back at any time is not affected by the statute, and such an agreement is a part of the executed sale.⁶ Where the vendor of stock agrees to take it back, and in the mean-

¹ *Flowers v. Steiner*, 108 Ala. 440 (1895). Where stock is sold and the certificate transferred to the vendee, and is then attached to a note given in payment of part of the purchase price, this constitutes a delivery and acceptance of the stock, and the statute of frauds does not invalidate the sale. *Dinkler v. Baer*, 93 Ga. 432 (1893). In *Cameron v. Tompkins*, 72 Hun, 113 (1893), it was held that the statute of frauds prevented the collection of a note which was given in payment for stock, even though the stock was collateral security for the note, and even though there were letters prior to the sale in which the proposed sale was referred to. The court said: "A contract to sell shares of stock in a private corporation is within the third section of the statute of frauds of the state of New York."

² *Tomlinson v. Miller*, 7 Abb. Pr. (N. S.) 364 (1869). Nor as between persons, one of whom buys stock in his own name for the joint benefit of both. *Stover v. Flack*, 41 Barb. 162 (1862).

³ *Gadsden v. Lance*, McMull. Eq. (S. C.) 87 (1841); *Green v. Brookins*, 23 Mich. 48, 54 (1871), where a person was induced to subscribe on parol contract that a purchaser for the stock would afterwards be found. In Massachusetts, on similar facts, except that a certain person agreed to purchase, a contrary decision was

rendered. *Boardman v. Cutter*, 128 Mass. 388 (1880).

⁴ *Porter v. Wormser*, 94 N. Y. 431, 450 (1884).

⁵ *Mayer v. Child*, 47 Cal. 142 (1873).

⁶ *Fitzpatrick v. Woodruff*, 96 N. Y. 561 (1884); *Thorndike v. Locke*, 98 Mass. 340 (1867); *Fay v. Wheeler*, 44 Vt. 292 (1872); *Bank of Lyons v. Demon, Hill & D. Supp.* 398 (1844). An agreement by promoters with a subscriber for stock that they would take the stock from him within a certain time, if he desired, is valid and enforceable. *Meyer v. Blair*, 109 N. Y. 600 (1888); *Morgan v. Struthers*, 131 U. S. 246 (1889). An agreement to take back bonds if the vendee desires to return them is valid and enforceable. *Johnston v. Trask*, 116 N. Y. 136 (1889). A guaranty that a vendor will take back the stock sold if the vendee desires is enforceable, even after the company sells out to another company for its shares of stock, the vendee not assenting. *Richter v. Frank*, 41 Fed. Rep. 859 (1890). An agreement of the vendor to buy back the stock is enforceable. *Graham v. Houghton*, 153 Mass. 384 (1891). The agreement of the vendor of stock to buy it back at the price paid, and one per cent a month in addition, is not usurious as a matter of law. *Phillips v. Mason*, 66 Hun. 580 (1893). Where the vendor agrees to refund the money upon the return

time the corporation fails and the stock is assessed, the vendor must refund to the vendee the assessment as well as the pur-

of the stock sold, the vendee cannot sue for the money unless he returns the stock. *Henderson v. Wheaton*, 139 Ill. 581 (1891). Where stock is sold with a contract on the part of the vendor that he will repurchase it if desired "at the end of one year," the time may be extended by oral agreement. *Weld v. Barker*, 153 Pa. St. 465 (1893). The vendee, in enforcing the contract of the vendor to take the stock back, must make and allege a tender. *Taylor v. Blair*, 59 Hun, 347 (1891). An agreement of the vendor to repurchase the stock at the option of the purchaser at the end of one year becomes enforceable at the end of one year, excluding the day of the contract from the count. A custom of brokers to the contrary does not apply to such a transaction. An extension of the time by the original vendor by agreement does not waive his rights. *Weld v. Barker*, 153 Pa. St. 465 (1893). Where, however, the vendee turns in his stock on a reorganization and takes new stock, he cannot enforce the vendor's contract. *Kolsky v. Enslen*, 103 Ala. 97 (1894). Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock, and gives a proxy thereon and attends meetings, he waives his right to rescind. *Jessop v. Ivory*, 158 Pa. St. 71 (1893). A receipt given by a vendor may, by its wording, be a contract on the part of the vendor to take the stock back if the vendee becomes dissatisfied. *Jessop v. Ivory*, 172 Pa. St. 44 (1895). Where it is agreed between the vendor and vendee stockholder that the money should be paid to the cor-

poration in order to meet corporate debts, and the vendor agreed to repay the money if the stock became worthless, the statute of frauds does not prevent the vendee from recovering the money, even though the contract was oral. *Kilbride v. Moss*, 113 Cal. 432 (1896). Where a corporation issues stock in payment for a patent-right, and agrees to take back the stock and pay the par value thereof at the end of five years if the purchaser so wishes, the purchaser may enforce the agreement. *Browne v. St. Paul Plow Works*, 62 Minn. 90 (1895). A contract to repurchase stock may be assigned by the holder of the stock. *Mitchell v. Taylor*, 27 Oreg. 377 (1895). A verbal agreement to take the stock back is not good as against a note given in payment. *Riley v. Treanor*, 25 S. W. Rep. 1054 (Tex., 1894). The right to rescind and tender back stock after one year can be exercised only by a tender after the year and not before; but the tender is waived if the vendor states that he will not accept the tender. The fact that the vendee has sold some of the stock is immaterial if he has other shares to take the place of the part sold. The fact that, by agreement, the property has been merged in another corporation in the meantime is immaterial. *Schultz v. O'Rourke*, 18 Mont. 418 (1896). An agreement to repurchase at the end of a year if thirty days' notice is given is effective if the thirty days' notice is given at any time before the expiration of the year. *Maguire v. Halsted*, 18 N. Y. App. Div. 228 (1897). An agreement to reimburse a party as to stock "at or before" a certain date cannot be enforced by the promisee prior to the expiration of the specified time. *Wilson v. Bicknell*, 49 N. E. Rep. 113 (Mass., 1898).

chase price.¹ Where the vendee agrees in writing to resell the stock to the vendor at a specified price, an oral notice by the vendor that he wishes to repurchase is sufficient, but he must tender the money unless such tender is excused by the conduct of the vendee.²

So, also, the agreement of third parties to take the stock, or to protect from loss the party buying it, is enforceable if founded on a sufficient consideration.³

An agreement to take back stock on a certain day if the purchaser so desires does not enable the purchaser to tender the stock back after that day. *Cabot v. Kent*, 37 Atl. Rep. 945 (R. I., 1897).

¹ *Gay v. Dare*, 103 Cal. 454 (1894).

² *Hanson v. Slaven*, 98 Cal. 377 (1893).

³ Where a stockholder subscribes for an increased capital stock on the agreement of parties to take the stock if the subscriber does not want it, the latter may hold the former liable for the difference between what the latter pays for the stock and what he is able to sell it for. *Herd v. Thompson*, 149 Pa. St. 434 (1892). A guaranty that the vendee of stock shall not lose money by the purchase may be enforced by the vendee when he proves that the stock has no market value, and that he has tried to sell it but has failed. *Phipps v. Sharps*, 142 Pa. St. 597 (1891). A statement of a party who is endeavoring to sell stock for another, that he will see the latter whole in the matter, creates no liability on the part of the former. *Martin's Estate*, 131 Pa. St. 638 (1890). A person who writes to a party, when the latter subscribes for stock, that the former will pay the subscription if the road is not completed within a certain time, is a surety and may be held liable. *Allison v. Wood*, 147 Pa. St. 197 (1892). An agreement of a stockholder that another stockholder shall be made "whole" for any loss due to not selling stock is without consider-

ation and void. *Martin's Estate*, 4 R'y & Corp. L. J. 449 (Orphans' Ct. Phil., 1888). A person induced to subscribe by an agreement of a third person to purchase the stock at par at any time may collect from the latter the difference between the price at which the former sells and the par value, the latter having declined to perform. *Lewis v. Coates*, 93 Mo. 170 (1888). See also § 334, *supra*. A memorandum, "We agree to pay A. Ram-packers the par value of this stock . . . upon the surrender of this certificate" indorsed on the back of the certificate enables him to tender the stock and collect the par value, even though there was no consideration for the promise. *Wheaton v. Ram-packers*, 3 Wyo. 441 (1891). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. *Wilbur v. Stoepel*, 83 Mich. 344 (1890). Where certain stockholders agreed with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. *Rogers v. Burr*, 97 Ga. 10 (1895).

§ 340. *Other sections of statute of frauds as affecting sales of stock.*—The provision of the statute of frauds relative to answering for the debts, defaults, or miscarriages of another does not apply to a guaranty that there will be a certain dividend on stock purchased,¹ nor to a broker's relation towards his client.² The provision of the statute relative to transfers of land does not apply to stock,³ since shares of stock are personal property.⁴ A transfer of stock for the purpose of defrauding the transferrer's creditors is void, and a court of equity will set it aside,⁵ or the stock may be attached or sold under execution the same as though no attempt at transfer had been made.⁶

B. GAMBLING SALES OF STOCK.

§ 341. *What are wager stock sales.*—Executory contracts for the sale of stock may be made with an intent to actually deliver the stock, or they may be made with an intent not to deliver it, but to pay in cash the amount lost or won by the rise or fall of the market price of the stock. A sale with the former intent is, at common law, legal and valid.⁷ A sale with the latter in-

¹ *Moorehouse v. Crangle*, 36 Ohio St. 130 (1880).

² *Genin v. Isaacson*, 6 N. Y. Leg. Obs. 213 (1848); *Rogers v. Gould*, 6 Hun, 229 (1875).

³ *Watson v. Spratley*, 10 Exch. 222 (1854); *Powell v. Jessopp*, 18 C. B. 336 (1856); *Walker v. Bartlett*, 18 C. B. 845 (1856); *Ashworth v. Munn*, L. R. 15 Ch. D. 363, 368 (1880).

⁴ See ch. I, *supra*.

⁵ See § 481, *infra*.

⁶ See § 484, *infra*.

⁷ *Irwin v. Williar*, 110 U. S. 499, 508 (1884), the court saying: "The generally accepted doctrine of this country is . . . that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by

the buyer; and if under guise of such a contract the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by force of the statute of 8 and 9 Vict., c. 109, § 18, altering the common law in that respect." In England it is held that although the parties may have contemplated that, as a whole, there would be a mere payment of differences between them, yet, inasmuch as the actual contracts entered into involved the liability for the actual delivery of the stock dealt with, they were not gaming or wagering transactions. *Universal Stock Exch. v. Stevens*, 66 L. T. Rep. 612 (1892). It may be speculation;

tent is a gambling or wager contract, and is not enforceable.¹ The essential difference between a wager contract and a contract not a wager is whether there is an intent to deliver the property sold.²

nevertheless it is valid. *Clarke v. Foss*, 7 Biss. 540 (1878); S. C., 5 Fed. Cas. 955; *Smith v. Bouvier*, 70 Pa. St. 325 (1872); *Kirkpatrick v. Bonsall*, 72 Pa. St. 155 (1872), where the court said: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly;" *Hatch v. Douglas*, 48 Conn. 116 (1880); *Flagg v. Baldwin*, 38 N. J. Eq. 219 (1884); *Kent v. Miltenberger*, 13 Mo. App. 503 (1883). If deliveries are made the transaction is not gambling. *Pratt v. Boody*, 35 Atl. Rep. 1113 (N. J., 1896). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. *Peck v. Doran, etc. Co.*, 57 Hun, 343 (1890).

1 "Wagers at common law are valid and enforceable in the courts;" and, with certain exceptions growing out of the peculiar subject of the wager, they have been held to be valid contracts. *Dewey, Contracts for Future Delivery, etc.* (1886), p. 10. To same effect: *Good v. Elliott*, 3 T. R. 693 (1790); *Gilbert v. Sykes*, 16 East, 150 (1812); *Atherfold v. Beard*, 2 T. R. 610 (1788); *Morgan v. Pebrer*, 4 Sco. 230 (1837); *Hussey v. Crickitt*, 3 Camp. 168 (1811); *Grant v. Hamilton*, 3 McLean, 100 (1842); S. C., 10 Fed. Cas. 978; *Campbell v. Richardson*, 10 Johns. 406 (1813); *Bunn v. Riker*, 4 Johns. 426 (1809); *Johnson v. Fall*, 6 Cal. 359 (1856); *Johnston v. Russell*, 37 Cal. 670 (1869); *Dewees v. Miller*, 5 Harr. (Del.) 347 (1851); *Porter v. Sawyer*, 1 Harr. (Del.) 517 (1832); *Griffith v. Pearce*, 4 Houst. (Del.) 209 (1870); *Richard-*

son v. Kelly, 85 Ill. 491 (1877); *Petillon v. Hipple*, 90 Ill. 420 (1878); *Trenton, etc. Ins. Co. v. Johnson*, 24 N. J. L. 576 (1854); *Dunman v. Strother*, 1 Tex. 89 (1846); *McElroy v. Carmichael*, 6 Tex. 454 (1851); *Wheeler v. Friend*, 22 Tex. 683 (1859); *Monroe v. Smelly*, 25 Tex. 586 (1860). *Contra: In Pennsylvania*—*Edgell v. McLaughlin*, 6 Whart. 176 (1841); *Phillips v. Ives*, 1 Rawle, 36 (1828); *Brua's Appeal*, 55 Pa. St. 294 (1867); in *Vermont*—*Collamer v. Day*, 2 Vt. 144 (1829); *Tarleton v. Baker*, 18 Vt. 9 (1843); in *New Hampshire*—*Clark v. Gibson*, 12 N. H. 386 (1841); *Winchester v. Nutter*, 52 N. H. 507 (1872); in *Maine*—*McDonough v. Webster*, 68 Me. 530 (1878); *Gilmore v. Woodcock*, 69 Me. 118 (1879); *Missouri*—*Waterman v. Buckland*, 1 Mo. App. 45 (1876); and *Massachusetts*—*Ball v. Gilbert*, 53 Mass. 397 (1847); *Babcock v. Thompson*, 20 Mass. 446 (1826); *Sampson v. Shaw*, 101 Mass. 145 (1869). The supreme court of the United States said, in *Irwin v. Williar*, 110 U. S. 499 (1884): "In England it is held that the contracts, although wagers, were not void at common law, . . . while generally, in this country, all wagering contracts are held to be illegal and void as against public policy," citing *Dickson v. Thomas*, 97 Pa. St. 278 (1881); *Gregory v. Wendell*, 40 Mich. 432 (1879); *Lyon v. Culbertson*, 83 Ill. 33 (1876); *Melchert v. American U. Tel. Co.*, 3 McCrary, 521 (1882); S. C., 11 Fed. Rep. 193 and note; *Barnard v. Backhaus*, 52 Wis. 593 (1881); *Love v. Harvey*, 114 Mass. 80 (1873); *Embrey v. Jemison*, 131 U. S. 336 (1889).

² *Roundtree v. Smith*, 108 U. S. 267 (1883); *Re Hunt*, 26 Fed. Rep. 739 (1886). *Mr. Dewey (Contracts for*

§ 342. *Statutes prohibiting wager contracts, and also certain stock contracts.*—There are two classes of statutes affecting stock sales as regards their speculative character. One class does not specify sales of stock, but declares in general terms that all gaming and wagering contracts shall be void, thereby rendering actions for the recovery of money won on such wagers unsustainable. Such statutes exist in England¹ and New York.² The second class of statutes is more explicit, and prohibits specified transactions in stock, irrespective of whether such transactions be wager contracts or not. Statutes affecting speculative sales of stock exist in many of the states. In Massachusetts short sales are prohibited;³ in Ohio, sales of

Future Delivery and Commercial Wagers, p. 28) states the rule accurately as follows: "Where the parties to a contract in the form of a sale agree expressly or by implication, at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future, such a transaction is a wager," citing many cases. If there is an intent to deliver, then the transaction is legal, though the parties "exercise the option of settling the difference in price, rather than make delivery of the property." *Ward v. Vosburgh*, 31 Fed. Rep. 12 (1887). As regards sales and margins, see § 457, *infra*. In Indiana it was held that a note given in New York to settle a gambling cotton debt was governed by New York laws as to its legality. *Sondheim v. Gilbert*, 117 Ind. 71 (1888).

¹ 8 & 9 Vict., c. 109, § 18; *Grizewood v. Blane*, 11 C. B. 526 (1851). Agreements between buyers and sellers of stock to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions within the meaning of the statute. *Thacker v. Hardy*, L. R. 4 Q.

B. D. 685 (1878). The statute does not necessarily affect "corners" in stocks. *Barry v. Croskey*, 2 J. & H. 1 (1861). As to the application of this statute, see also *Heiman v. Hardie*, 12 Ct. of Sess. 406 (Sc., 4th ser., 1885).

² 1 N. Y. Rev. Stats. 662, § 8 (vol. III, p. 1962, 7th ed.). As applied to stock cases, see *Kingsbury v. Kirwan*, 77 N. Y. 612 (1879); *Story v. Salomon*, 71 N. Y. 420 (1877); *Harris v. Tumbidge*, 83 N. Y. 92 (1880); *Yerkes v. Salomon*, 11 Hun, 471 (1877).

³ Mass. Gen. Stat., ch. 105, § 6. For cases arising under this and similar statutes, see *Howe v. Starkweather*, 17 Mass. 240 (1821); *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829); *Barrett v. Mead*, 92 Mass. 337 (1865); *Brigham v. Mead*, 92 Mass. 245 (1865); *Barrett v. Hyde*, 73 Mass. 160 (1856); *Durant v. Burt*, 98 Mass. 161 (1867); *Brown v. Phelps*, 103 Mass. 313 (1869); *Price v. Minot*, 107 Mass. 49 (1871); *Colt v. Clapp*, 127 Mass. 476 (1879); *Rock v. Nicholls*, 85 Mass. 342 (1862); *Wyman v. Fiske*, 85 Mass. 238 (1861); *Pratt v. American Bell Teleph. Co.*, 141 Mass. 225 (1886), following the decisions under the New York statute, from which the statute in question was copied.

In Pennsylvania, by statute, sales for future delivery were prohibited. See Pa. Laws 1841, p. 398, § 6. This

stock for future delivery, which the vendor has not on hand or the vendee the means to pay for;¹ in Illinois, all options are made gambling contracts and are void;² in Georgia, short sales cannot be enforced.³ In New York, the statute of 1812,⁴ re-enacted in the Revised Statutes of 1828,⁵ prohibiting short sales, was repealed by implication by the statute of 1858, declaring the sale to be valid though there be no consideration or payment of consideration, or no ownership by the vendor of such stock at the time of the sale. Various other states have statutes on this subject.⁶ In California the question whether stock purchased on a margin violates the constitutional prohibi-

statute has been repealed. For decisions, see *Krause v. Setley*, 2 Phila. Rep. 32 (1856); *Chillas v. Snyder*, 1 Phila. Rep. 289 (1852).

¹ Ohio Laws, 1885, p. 254. Gambling contract in grain. *Lester v. Buel*, 49 Ohio St. 240 (1892).

² Ill. Rev. Stat. (Starr & C.), p. 791, ¶ 178. For decisions, see *Wolcott v. Heath*, 78 Ill. 433 (1875); *Pickering v. Cease*, 79 Ill. 328 (1875); *Pixley v. Boynton*, 79 Ill. 351 (1875); *Sanborn v. Benedict*, 78 Ill. 309 (1875); *Cole v. Milmine*, 88 Ill. 349 (1878). This statute is restricted by the decisions to cases where the transaction is to be "adjusted only by differences." But see *Ward v. Vosburgh*, 31 Fed. Rep. 12 (1887). In Illinois, by statute, an option to buy coal at a future time is void. *Osgood v. Bauder*, 75 Iowa, 550 (1888). A sale with an agreement of the vendor to take the stock back at the same price and interest within a certain time if the vendee desired is not a gambling contract under the Illinois statute. *Richter v. Frank*, 41 Fed. Rep. 859 (1890). Concerning an indictment under the Illinois law for keeping a "bucket shop," see *Soby v. People*, 134 Ill. 66 (1890). In Illinois, by statute, a "put" is void. *Schneider v. Turner*, 130 Ill. 28 (1889). The statute against cornering the market applies to a purchase of corn to raise its price. *Foss v. Cummings*, 149 Ill. 353 (1894).

³ Ga. Code, § 2638.

⁴ 2 R. L. 187, § 18.

⁵ 1 R. S., p. 710, § 6. For cases coming under this statute, see *Dykers v. Townsend*, 24 N. Y. 57 (1861), disapproving *Stebbins v. Leowolf*, 57 Mass. 137, 143 (1849). See also *Thompson v. Alger*, 53 Mass. 428 (1847), on the New York statute; *Staples v. Gould*, 9 N. Y. 520 (1854), (criticising *Gram v. Stebbins*, 6 Paige, 124—1836); *Frost v. Clarkson*, 7 Cow. 24 (1827); *Cassard v. Hinmann*, 14 How. Pr. 84 (1856); aff'd, 1 Bosw. 207. In New York a director is prohibited from selling "short." Laws 1884, ch. 223. In Arkansas a broker and others are liable criminally for doing business in futures. *Fortenbury v. State*, 47 Ark. 188 (1886).

⁶ A promissory note is void under the Tennessee act against gambling in futures where such note was given therein. *Snoddy v. American Nat. Bank*, 88 Tenn. 573 (1890). The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. *Cashman v. Root*, 89 Cal. 373 (1891). Gambling stock transactions have been held void under the Kentucky statute in *Lyons v. Hodgen*, 90 Ky. 280 (1890).

bition is one of fact.¹ In Massachusetts the device is resorted to of a statute enabling the customer to sue the broker for any losses,² but a cause of action given by the statute for margins paid may be released after it has accrued.³ In England the statute of 1734,⁴ prohibiting gambling in the public funds, was repealed in 1860,⁵ but the statute of 1845 still exists.⁶ It is evident from the history of these statutes against stock gambling that it is a difficult and delicate task to frame a statute that will cure the evil. The great danger is that any such statute will interfere with legitimate transactions—transactions which for many years have been building the railways and developing the material resources of the country.⁷

§ 343. *Test of legality of stock transactions.*—Although, as already stated, stock sales, where no delivery, but merely a settlement of gain or loss, is intended, are wagers, and although

¹ Kullman v. Simmens, 104 Cal. 595 (1894).

² Crandell v. White, 164 Mass. 54 (1895).

³ Wall v. Metropolitan Stock Exchange, 168 Mass. 282 (1897).

⁴ 7 Geo. II., c. 8, and 10 Geo. II., c. 8. For cases under this statute, see Hewitt v. Price, 4 Man. & G. 355 (1842); Fisher v. Price, 11 Beav. 194 (1848); Mortimer v. McCallan, 6 M. & W. 58 (1840); Elsworth v. Cole, 2 M. & W. 31 (1836); Byles on Bills, 15th ed., p. 161; 2 Kent, Com., 468, note (i). The statute did not apply to stock in private corporations. Hibblewhite v. McMorine, 5 M. & W. 462 (1839), overruling Bryan v. Lewis, Ryan & M. 386 (1826).

⁵ 23 & 24 Vict., c. 28.

⁶ Where both parties to a transaction on the stock exchange intend that no stocks shall be delivered, but only that "differences" shall be paid, the fact that the contract provides that either party may require completion of the purchase and delivery or receipt of the stock does not prevent the transaction from being a gaming and wagering contract within the Gaming Act, 1845 (8 & 9

Vict., c. 109), and therefore void. Universal, etc. Exchange v. Strachan, [1896] A. C. 166, holding also that securities deposited in connection with such a contract may be recovered back.

⁷ Dos Passos, Stock Brokers & Stock Exch. (1882), p. 405, says: "The history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. In almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by 'the unbridled and defiant spirit of speculation,' despite the earnest efforts of the courts to enforce them, they have finally been repealed. It is, perhaps, better to allow the evil to correct itself, as it surely does, than to bring the administration of justice into contempt by filling the books with useless laws, which are at all times openly violated and laughed at, and which seem hardly more effective to prevent the practices at which they are aimed than legislation directed against the laws of nature."

such wagers are void by the statutes of some states, and by the rules of public policy in others,¹ yet difficulty is experienced in determining whether the parties really intended to deliver the stock or to pay differences. The question of intent is always difficult of ascertainment and of positive proof. It is pre-eminently a question for the jury. It is accordingly found in most of the cases involving the question whether the transaction was stock gambling, that the court submitted to the jury whether an actual delivery of the stock was intended or not. If not, then, as a matter of law, the transaction was a wager. If a wager, it is, by statute in some states, by public policy in others, a void transaction, and the parties have only the rights given them on void contracts.²

§ 344. *When intent to deliver is question for the jury and when not.*—The question whether the parties to an executory sale of stock intended to actually deliver the stock, or merely to pay and receive the gain or loss, is for the jury.³ In the application of this rule, however, great care is to be exercised in submitting the question and charging the jury. Thus, an “option,” “put,” “call,” “straddle,” or other similar stock-exchange contract, may be made with an intent to actually deliver the stock, and, if so, are unobjectionable and are enforceable.⁴ The

¹ Particularly in Pennsylvania are such stock wagers void by public policy. *Worth v. Phillips*, 89 Pa. St. 250 (1879); *Fareira v. Gabell*, 89 Pa. St. 89 (1879); *Ruchizky v. De Haven*, 97 Pa. St. 202 (1881); *Dickson v. Thomas*, 97 Pa. St. 278 (1881); *Brua's Appeal*, 55 Pa. St. 294 (1867).

² See §§ 345, 346, *infra*. See also *Greenhood*, Pub. Policy, pp. 230-237.

³ *Whitesides v. Hunt*, 97 Ind. 191 (1884); *Gregory v. Wendell*, 39 Mich. 337 (1878). And all the circumstances are to be taken into consideration. *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881); *Hawley v. Bibb*, 69 Ala. 52 (1881); *Brand v. Henderson*, 107 Ill. 141 (1883); *Barnard v. Backhaus*, 52 Wis. 593 (1881); *Kirkpatrick v. Bon-sall*, 72 Pa. St. 155 (1872).

⁴ For definitions of these terms, see § 445, n., *infra*. A “put” is not *per se*

conclusive evidence of an intent not to deliver. *Bigelow v. Benedict*, 70 N. Y. 202 (1877). A “straddle” follows the same rule. The parties may have intended to deliver the stock. *Harris v. Tumbridge*, 83 N. Y. 92 (1880); *Story v. Salomon*, 71 N. Y. 420 (1877). *Cf. Ex parte Young*, 6 Biss. 53 (1874); S. C., 30 Fed. Cas. 828; *Webster v. Sturges*, 7 Ill. App. 560 (1880); *Tenney v. Foote*, 4 Ill. App. 594 (1879); *Lyon v. Culbertson*, 83 Ill. 33 (1876); *Gilbert v. Gaugar*, 8 Biss. 214 (1878); S. C., 10 Fed. Cas. 345. A short sale is not *per se* a wager, nor is it presumed to be. *Maxton v. Gheen*, 75 Pa. St. 166 (1874); *Hess v. Rau*, 95 N. Y. 359 (1884); *Knowlton v. Fitch*, 52 N. Y. 288 (1873); *White v. Smith*, 54 N. Y. 522 (1874); *Cameron v. Durkheim*, 55 N. Y. 425 (1874); *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243 (1882).

parties may be asked directly whether they intended that a delivery should be made.¹ If one party intended to have a delivery the transaction is valid, even though the other party intended otherwise.² As between a party and his broker, however, greater difficulty arises, and in some jurisdictions the intent between them governs their relations, irrespective of the intent of the party dealing with them.³ The fact that stock transactions were carried on by "margins" is no evidence that they were gambling contracts,⁴ excepting in Maryland and New

These decisions rest upon the principle of law laid down in *Stanton v. Small*, 3 Sandf. 230 (1849), that "a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them at the time appointed for delivering them, otherwise than by purchasing them after making the contract." There are many cases to the same effect. See *Noyes v. Spaulding*, 27 Vt. 420 (1855); *Shales v. Seignoret*, 1 Ld. Raym. 440 (1700); *Frost v. Clarkson*, 7 Cow. 25 (1827); *Dewey*, *Contracts for Future Delivery*, p. 97; *Thacker v. Hardy*, L.R. 4 Q. B. D. 685 (1878), holding that, if the intent at the time of buying was to deliver, it is not a wager, even though that intent be afterwards changed. As to the legality of a "corner," see § 621*b*, *infra*. Where there is evidence of some intent to deliver, the transaction is not gambling. *Cothran v. Ellis*, 125 Ill. 496 (1888). A sale, delivery to be in twelve months, or, if vendor wishes, before then, is not a gambling contract. *Perryman v. Wolfe*, 93 Ala. 290 (1890).

¹ *Yerkes v. Salomon*, 11 Hun, 471 (1877); *Cassard v. Hinman*, 6 Bosw. 9, 14 (1860); *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41 (1885); *Ex parte Young*, 6 Biss. 53 (1874);

S. C., 30 Fed. Cas. 828. In the case of *Porter v. Viets*, 1 Biss. 177 (1857); S. C., 19 Fed. Cas. 1077, the court refused to admit parol evidence that the contract was gambling, for the reason that it varied a written contract.

² *Wall v. Schneider*, 59 Wis. 352 (1884); *Irwin v. Williar*, 110 U. S. 499 (1884); *Whitesides v. Hunt*, 97 Ind. 191 (1884); *Pixley v. Boynton*, 79 Ill. 351 (1875); *Ward v. Vosburgh*, 31 Fed. Rep. 12 (1887); *Powell v. McCord*, 121 Ill. 330 (1887); *Lehman v. Strassberger*, 2 Woods, 554 (1875); S. C., 15 Fed. Cas. 254; *Conner v. Robertson*, 37 La. Ann. 814 (1885). *Contra*, *Fareira v. Gabell*, 89 Pa. St. 89 (1879). *Cf.* *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881). In Tennessee, by statute, dealing in futures is gambling, if either party does not intend to deliver. See *McGrew v. City Produce Exchange*, 85 Tenn. 572 (1887). If either of the parties intends, at the close of a series of transactions in buying and selling stocks, to accept or make actual delivery of the remaining stock, the transaction is not gambling, as between the customer and broker, although the buying and selling are done upon a margin in the hope of profit from the fluctuations. *Dillaway v. Alden*, 88 Me. 230 (1895).

³ See §§ 345, 346, *infra*.

⁴ *Sawyer v. Taggart*, 14 Bush (Ky.), 727 (1879); *Wall v. Schneider*, 59 Wis. 352 (1884); *Bartlett v. Smith*, 13 Fed. Rep. 263 (1882); *Whitesides v. Hunt*,

Jersey. In these states this fact alone seems to be sufficient evidence of a wager.¹ A cotton mill may purchase cotton to be delivered in the future and may put up a margin to carry the contract.² A wager contract is not proved by the fact that the party selling stock to be delivered at a future time intends to purchase that amount of stock in time for the delivery, or *vice versa*.³ “An executory contract for the sale of goods

97 Ind. 191 (1884); *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438 (1883); *Hatch v. Douglas*, 48 Conn. 116 (1880). Many other cases do not directly pass on this question, but assume that the deposit of a margin, as a security to the broker, does not prove an intent not to have a delivery of the stock. Where the customer called for the stock, and it is tendered to him, the broker may recover the price, even though the stock was first bought on a margin. *Anthony v. Unangst*, 174 Pa. St. 10 (1896). Transactions on margins are not necessarily gambling. *Hopkins v. O’Kane*, 169 Pa. St. 478 (1895). But see *Ruchizky v. De Haven*, 97 Pa. St. 202 (1881); *Dickson v. Thomas*, 97 Pa. St. 278 (1881); *Fareira v. Gabell*, 89 Pa. St. 89 (1879); *Maxton v. Gheen*, 75 Pa. St. 166 (1874); *North v. Phillips*, 89 Pa. St. 250 (1879).

¹ *Flagg v. Baldwin*, 38 N. J. Eq. 219 (1884). See also *Justh v. Holliday*, 13 Mackey, 346 (1883). A purchase on margin is gambling *per se*. *Cover v. Smith*, 82 Md. 586 (1896). A broker cannot enforce a contract between himself and his customer, where the customer testifies that he put up \$100 as a margin for one hundred shares of stock, and that if the stock advanced a point he would have a profit, and if it declined a point he would lose the \$100, and also another \$100 to be paid. *Billingslea v. Smith*, 77 Md. 504 (1893).

² *Sampson v. Camperdown Cotton Mills*, 82 Fed. Rep. 833 (1897).

³ In *Ashton v. Dakin*, 7 W. R. 384 (1859), the court held it not to be a

wager contract to order a broker to buy stock, “and let the bargain be so as to the day of payment that you may have an opportunity of reselling it for me by such a day, when I expect the market will have risen, and then you will pay the seller for me with the money you receive from the purchaser, and I shall receive the gain from you, if any, or pay you the loss.” So, also, *Smith v. Bouvier*, 70 Pa. St. 325 (1872), holds that stocks bought and sold upon speculation are not necessarily wager contracts. A person may sell without owning the stock, and at time of delivery buy to deliver, and yet the transaction be not a wager, where the jury finds that there was an intent to deliver in both the selling and buying. See also *Thacker v. Hardy*, L. R. 4 Q. B. D. 685 (1878); *Sawyer v. Taggart*, 14 Bush (Ky.), 727 (1879). In Massachusetts it is held that the contract is not gambling merely because there was an expectation that only differences would be settled. *Barnes v. Smith*, 159 Mass. 344 (1893). Where the seller of grain does not intend to deliver the property sold, but simply to settle the difference in price, the transaction is illegal under a statute, whether his brokers and the purchaser knew of his intention or not. Margins lost in such transactions cannot be recovered back. *Connor v. Black*, 132 Mo. 150 (1896). A purchase of corn may be legal although made to fill certain sales which the party had made previously. A mortgage given to a broker for advancements made in the transaction is

for future delivery is not infected with the quality of a wager by reason of the fact that at its date the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them, unless by subsequently going into the market and buying them.”¹ The financial responsibility of the parties,² and their other transactions in the same line,³ are admissible as evidence as to whether there was an intent to deliver the stock or merely to pay the gain or loss. The burden of proving that a stock transaction is a gambling contract is upon him who affirms it.⁴

valid. *Douglas v. Smith*, 74 Iowa, 468 (1888).

¹ *Conner v. Robertson*, 37 La. Ann., 814 (1885), the court saying also that *Lorymer v. Smith*, 1 Barn. & C. 1 (1822), has been repeatedly overruled. See also *supra*, p. 672, n. 4.

² *Kirkpatrick v. Bonsall*, 72 Pa. St. 155 (1872); *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41 (1885); *Re Green*, 7 Biss. 338 (1877); S. C., 10 Fed. Cas. 1084; *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881); *Justh v. Holliday*, 13 Mackey, 346 (1883); *North v. Phillips*, 89 Pa. St. 250 (1879); *Patterson's Appeal*, 16 Rep. 59 (Pa., 1883); *Flagg v. Baldwin*, 38 N. J. Eq. 219 (1834); *Colderwood v. McCrea*, 11 Ill. App. 543 (1882). The fact that one of the parties is already under obligation to other parties to purchase cotton several times greater in value than his fortune is evidence of an intent to gamble. *Beadles v. McElrath*, 85 Ky. 230 (1887). The fact that a party is financially unable to pay for property is evidence that the contract is gambling. *Myers v. Tobias*, 16 Atl. Rep. 641 (Pa., 1889).

³ *Kirkpatrick v. Bonsall*, 72 Pa. St. 155 (1872); *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881); *Irwin v. Williar*, 110 U. S. 499 (1884). *Contra*, *Tomblin v. Callen*, 69 Iowa, 229 (1886). The jury, in passing upon the defense to a note that it was given in a stock-gambling operation, may consider all the acts

and accounts and the actual dealings. *Gaw v. Bennett*, 153 Pa. St. 247 (1893). As to the competency of evidence herein, and that evidence of custom of settling by differences is incompetent, see *Scofield v. Blackmarr*, 4 Atl. Rep. 208 (Pa., 1886). Proof of intent to deliver may be by the conduct of the parties as well as the contract. *Press v. Duncan*, 69 N. W. Rep. 543 (Iowa, 1896).

⁴ Dewey, *Contracts for Future Delivery*, p. 207, says: “All the cases except *Barnard v. Backhaus*, 52 Wis. 593 (1881); *Cobb v. Prell*, 15 Fed. Rep. 774 (1883); *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881); *Stebbins v. Leowolf*, 57 Mass. 137 (1849), and possibly *Chandler's Case*, *Ex parte Young*, 6 Biss. 53 (1874); S. C., 30 Fed. Cas. 828, hold that these contracts are presumed to be *bona fide*; and in order to show them to have been used as covers for wagers, an agreement to that effect must appear to have been made. According to these excepted cases, option contracts are presumed to be invalid, and proof must be made that they are *bona fide*.” See also Dewey, *Contracts for Future Delivery*, p. 46. In Illinois the burden of proof is on the defendant to prove a gambling intent on the part of both parties. In Wisconsin a contrary rule seems to prevail. See *Ward v. Vosburgh*, 31 Fed. Rep. 12 (1887).

§ 345. *Gambling stock contracts as affecting the relations between the principal and his broker.*—A broker is but an agent of his principal. As such he may hold the principal liable for commissions and for losses paid on stock transactions where those stock transactions are legitimate and legal. Where, however, the stock contracts are of a wager or gambling nature, a more difficult question arises, and the decisions are irreconcilable. In England, in 1878, Judge Lindley, in *Thacker v. Hardy*,¹ a carefully-considered case, held that, where the principal has been carrying on gambling transactions, he cannot escape or repudiate his liabilities to his broker in those transactions, even though the latter knew of the gambling character of the business. The principal is liable to his broker as though the transactions were free from such objections. This is the well-established rule in England.²

§ 346. In this country an opposite rule prevails for the most part. The great weight of authority holds that, where the broker has knowledge of the purpose to gamble in stocks and aids in carrying out that purpose, he cannot recover for services rendered or losses incurred and paid by himself.³ A few cases

¹ L. R. 4 Q. B. D. 685.

² *Re Hart*, 5 W. N. 95 (1870); *Cooper v. Neil*, 13 W. N. 128 (1878); *Ex parte Rogers*, L. R. 15 Ch. D. 207 (1880); *Faikney v. Reynous*, 4 Burr. 2069 (1767); *Jessopp v. Lutwyche*, 10 Exch. 614 (1854); *Knight v. Cambers*, 15 C. B. 562 (1855); *Knight v. Fitch*, 15 C. B. 566 (1855); *Lyne v. Siesfeld*, 1 H. & N. 278 (1856); *Rosewarne v. Billing*, 15 C. B. (N. S.) 316 (1863). In *Pidgeon v. Burslem*, 3 Exch. 465 (1849), the court says expressly: "The case differs altogether from those in which the contract is forbidden, as under the acts against stock-jobbing, or where the purpose for which the money was paid was illegal." *Contra*, *Byers v. Beattie*, Ir. Rep. 2 C. L. 220 (1867). A contract is not a gaming contract, and a broker may recover the balance due him on account, although the customer, a person of small means, instructed the broker to make purchases and sales and advanced

only a small part of the purchase-money, the balance being obtained by the broker by pledge of the security, and the customer never asking for delivery of the stock, and, as the broker well knew, did not purchase as an investment, but as a speculation, to sell again when the price went up, and the broker was paid by commissions on the transactions. *Forget v. Ostigny*, [1895] A. C. 318.

³ *Irwin v. Williar*, 110 U. S. 499, 510 (1884); *Flagg v. Gilpin*, 17 R. I. 10 (1890); *McLean v. Stuve*, 15 Mo. App. 317 (1884), per Thompson, J.; *Ream v. Hamilton*, 15 Mo. App. 577 (1884). *Cf.* *Kent v. Miltenberger*, 13 Mo. App. 503, 511 (1883). See also as supporting above rule, *Everingham v. Meighan*, 55 Wis. 354 (1882); *Re Green*, 7 Biss. 338 (1877); S. C., 10 Fed. Cas. 1084; *Bartlett v. Smith*, 13 Fed. Rep. 263 (1882); *Tenney v. Foote*, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99 (1880), defeating a note given to the broker;

hold to the same effect as the English rule.¹ Many cases which seem to favor the English rule do so only by dicta, inasmuch as the transactions involved in such cases are held not to be wager contracts.² In Pennsylvania and New Jersey the American rule is rigidly enforced. The broker is held to be dealing as a principal, not as an agent, in all stock-gambling transactions.³ He cannot recover commissions nor losses.⁴ If his principal is an infant, the broker is liable to such infant for all sums received by way of margins.⁵ If, however, the parties do not raise the question of the legality of the transaction, the court cannot.⁶ In Ohio it is held that the broker may be made to account for profits, even though the transaction was a gambling

Colderwood v. McCrea, 11 Ill. App. 543 (1882); *Webster v. Sturges*, 7 Ill. App. 560 (1880); *Barnard v. Backhaus*, 52 Wis. 593 (1881), defeating notes; *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881); *Whitesides v. Hunt*, 97 Ind. 191, 203 (1884); *Melchert v. American U. Tel. Co.*, 11 Fed. Rep. 193 (1882); *First Nat. Bank v. Oskaloosa Packing Co.*, 66 Iowa, 41 (1885), holding a note void; *Stewart v. Schall*, 65 Md. 289 (1886). Suit by broker against customer for moneys lost in purchase of grain for the customer. *Mohr v. Miesen*, 47 Minn. 228 (1891). Brokers are bound to know that banks have no power to purchase cotton futures on margins, and cannot recover commissions and losses on such transactions. The *ultra vires* contract was not executed, inasmuch as the corporation received no property. *Jemison v. Citizens' Sav. Bank*, 44 Hun, 412 (1887). A broker may recover commissions, etc., from his principal when the former knew nothing of the latter's intention to gamble. *Lehman v. Feld*, 37 Fed. Rep. 852 (1889); *Edwards v. Hoefflinghoff*, 38 Fed. Rep. 635 (1889); *Boyd v. Hanson*, 41 Fed. Rep. 174 (1890).

¹ *Brown v. Speyers*, 20 Gratt. (Va.) 296 (1871); *Wyman v. Fiske*, 85 Mass. 238 (1861), on the ground that the note sued on was a voluntary payment to

the broker; *Warren v. Hewitt*, 45 Ga. 501 (1872); *Marshall v. Thruston*, 3 Lea (Tenn.), 741 (1879), where also a note had been given; *Jackson v. Foote*, 12 Fed. Rep. 37 (1882), also a note case, the court saying that, as between the broker and his principal, the decision probably would be different. Cf. *Tinsley's Case*, cited in 10 Fed. Rep. 248.

² *Lehman v. Strassberger*, 2 Woods, 554 (1875); S. C., 15 Fed. Cas. 254; *Rumsey v. Berry*, 65 Me. 570 (1876); *Sawyer v. Taggart*, 14 Bush (Ky.), 727 (1879); *Durrant v. Burt*, 98 Mass. 161 (1867); *Williams v. Carr*, 80 N. C. 294 (1879).

³ *Ruchizky v. De Haven*, 97 Pa. St. 202 (1881).

⁴ *North v. Phillips*, 89 Pa. St. 250 (1879); *Flagg v. Baldwin*, 38 N. J. Eq. 219 (1884); *Fareira v. Gabell*, 89 Pa. St. 89 (1879), holding that notes given to the broker are void. The agent cannot recover commissions where he knew the transaction was gambling. *Dows v. Glasfield*, 4 N. D. 251 (1894).

⁵ *Ruchizky v. De Haven*, 97 Pa. St. 202 (1881). An infant gambling in stocks on a margin may recover from the brokers all that he deposited with them. *Mordecai v. Pearl*, 63 Hun, 553 (1892).

⁶ *Gheen v. Johnson*, 90 Pa. St. 38 (1879); *Williams v. Carr*, 80 N. C. 294 (1879).

one.¹ A note and mortgage given to the broker in settlement of a gambling transaction will not be interfered with.² The broker is not liable for a sale of the stock on failure of margin, without notice to the principal, where the business is gambling.³ A partner in a partnership for the purpose of carrying on a gambling business on the market cannot have an accounting from his partner.⁴

§§ 347, 348. *Gambling stock transactions as affecting notes, bonds, mortgages, etc., growing out thereof.*—The penalty of engaging in a stock-gambling operation is that, in case the transaction is declared by a court of justice to be illegal as a wager contract, the court declines to aid either party.⁵ As a general rule, all liability on the part of either party is unenforceable. Money paid by the principal cannot be recovered back.⁶ Neither principal can collect the gains of the transaction, and

¹ Norton v. Blinn, 39 Ohio St. 145 (1883). Where gambling stock transactions are closed and the account settled, and the balance due the customer is left on deposit with the broker, the latter must pay it over. Peters v. Grim, 149 Pa. St. 163 (1892).

² Clarke v. Foss, 7 Biss. 540 (1878); S. C., 5 Fed. Cas. 955. Cf. Tantum v. Arnold, 42 N. J. Eq. 60 (1886). At common law a mortgage and note given to a broker for commissions in buying and selling futures and for advances are legal. Where such note has been reduced to judgment in one state it will be enforced in another state. Peet v. Hatcher, 112 Ala. 514 (1896).

³ North v. Phillips, 89 Pa. St. 250 (1879).

⁴ Wright v. Cudahy, 48 N. E. Rep. 39 (Ill., 1897).

⁵ Rees v. Fernie, 13 W. R. 6 (1864), holding that the court will not aid one who has been tricked in gambling in stocks.

⁶ Gregory v. Wendell, 39 Mich. 337 (1878); S. C., 40 Mich. 432 (1879); Wyman v. Fiske, 85 Mass. 238 (1861). Cf. Norton v. Blinn, 39 Ohio St. 145 (1883). In Tennessee, by statute, a contrary

rule prevails. McGrew v. City Produce Exchange, 85 Tenn. 572 (1887); Dunn v. Bell, 85 Tenn. 581 (1887), holding also that where there are several partners or co-conspirators who take the principal's money they are liable therefor jointly and severally. Under the New York statute money paid by a customer to a broker on gambling speculations may be recovered back. Peck v. Doran, etc. Co., 57 Hun, 343 (1890). Where a gambling contract is illegal by statute, a customer who gave money to the broker to gamble with, according to orders, cannot recover it back. White v. Barber, 123 U. S. 392 (1887); Sowles v. Welden Nat. Bank, 61 Vt. 375 (1889). A *bona fide* sale of grain deliverable in a certain month, on a day to be fixed by seller, is not a gambling contract. White v. Barber, 123 U. S. 392 (1887). A certificate of deposit given to a broker in the course of gambling transactions may be recovered back. Dempsey v. Harm, 13 Atl. Rep. 27 (Pa. 1887). The customer may recover back money deposited in the hands of a third person for margins on a gambling contract. Dauler v. Hartley, 178 Pa. St. 23 (1896).

neither is liable for a loss.¹ Notes given in settlement are void and not collectible,² even in the hands of *bona fide* purchasers.³ Bonds and mortgages given in payment are void.⁴ Due-bills,⁵

¹ *Grizewood v. Blane*, 11 C. B. 526 (1851); *Webster v. Sturges*, 7 Ill. App. 560 (1880); *Ex parte Young*, 6 Biss. 53 (1874); S. C., 30 Fed. Cas. 828; *Thompson v. Cummings*, 68 Ga. 124 (1881); *Yerkes v. Salomon*, 11 Hun, 471 (1877). A partner, however, may have contribution for losses paid at the express request of the other member of the firm. *Petrie v. Hannay*, 3 T. R. 418 (1789).

² *Barnard v. Backhaus*, 52 Wis. 593 (1881); *Fareira v. Gabell*, 89 Pa. St. 89 (1879); *Lowry v. Dillman*, 59 Wis. 197 (1884); *Davis v. Davis*, 119 Ind. 511 (1889); *Justh v. Holliday*, 13 Mackey, 346 (1883); *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400 (1883); *Tenney v. Foote*, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99. *Cf. Wyman v. Fiske*, 85 Mass. 238 (1861). A person loaning money and taking notes therefor cannot be defeated in a suit on the notes by evidence that he knew the loan was to be used in gambling operations. Defendant must prove, also, that plaintiff intended that the money should be so used. *Waugh v. Beck*, 114 Pa. St. 422 (1886). Checks, notes, etc., in gambling contracts are void. *Kahn v. Walton*, 46 Ohio St. 195 (1889); *Embrey v. Jemison*, 131 U. S. 336 (1889). Sales and purchases in Ohio on margins are gambling and void, and a note in settlement of such transactions is void. *Morris v. Norton*, 75 Fed. Rep. 912 (1896). Notes given by the customer to the broker on dealings in stock, merely margins being paid, are illegal and not enforceable. *Mechanics', etc. Bank v. Duncan*, 36 S. W. Rep. 887 (Tenn., 1896). A note given by a broker for profits in gambling in grain is not enforceable.

Nave v. Wilson, 12 Ind. App. 38 (1894). If delivery was intended and made, a note by one of the principals to the other is good, although the warehouse receipts were left with the broker to secure advances. *Fisher v. Fisher*, 8 Ind. App. 665 (1894).

³ *Barnard v. Backhaus*, 52 Wis. 593 (1881); *Steers v. Lashley*, 6 T. R. 61 (1794); *Tenney v. Foote*, 4 Ill. App. 594 (1879); aff'd, 95 Ill. 99; *Cunningham v. Augusta Nat. Bank*, 71 Ga. 400 (1883); *Lowry v. Dillman*, 59 Wis. 197 (1884); *Root v. Merriam*, 27 Fed. Rep. 909 (1886). *Contra*, *Crawford v. Spencer*, 92 Mo. 498 (1887), citing *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243 (1882); also, *contra*, *Lilley v. Rankin*, 55 L. T. Rep. 814 (1886). An accommodation indorser to the note may set up the defense of illegality. *Justh v. Holliday*, 13 Mackey, 346 (1883). A note given to a bank is valid, though the proceeds were to pay a stock-gambling debt and the bank knew that fact. *Marshall v. Thruston*, 3 Lea (Tenn.), 741 (1879). *Cf. Cannan v. Bryce*, 3 B. & A. 179 (1819), and 40 Alt. Rep. 794.

⁴ *Amory v. Meryweather*, 2 B. & C. 573 (1824); *Flagg v. Baldwin*, 38 N. J. Eq. 219 (1884); *Griffiths v. Sears*, 112 Pa. St. 523 (1886); *Barnard v. Backhaus*, 52 Wis. 593 (1881). A judgment entered by confession on a bond given for a gambling debt may be set aside. *Everitt v. Knapp*, 6 Johns. 331 (1810); *Beveridge v. Hewitt*, 8 Ill. App. 467 (1881). A court of equity will enjoin the transfer of a note and will decree the cancellation of a mortgage given by a married woman in payment of her husband's stock-gambling debts. *Tantum v. Arnold*, 42 N. J. Eq. 60 (1886). But will not

⁵ *Rudolf v. Winters*, 7 Neb. 125 (1878).

acceptances,¹ and guarantees² of notes are not valid or enforceable. If a part of the consideration is void the whole contract and all securities given thereunder are void.³ In Illinois, by statute, a customer who deposits securities with a broker on a gambling stock contract may recover them back, even though he has not paid losses incurred in the transaction.⁴

C. FRAUD AS AFFECTING A SALE OF STOCK.

§ 349. *Extent of subject treated herein.*—In a previous chapter of this treatise the effect of fraud and fraudulent representations on a subscription for stock was fully treated. There is little difference in the principles of law governing fraud as affecting sales of stock from fraud as affecting subscriptions for stock. Most of the cases assume that the same principles apply to both kinds of transactions. Consequently, the questions of what constitutes fraud herein; what remedies the defrauded person has; and the general principles governing this branch of the law, will be fully understood only by a comparison of these two parts of this work.⁵

§ 350. *What has been held to constitute a fraud herein.*—It is difficult to lay down rules as to what does and what does not

where given by the party himself to his brokers. *Clarke v. Foss*, 7 Biss. 540 (1878); S. C., 5 Fed. Cas. 955. A mortgage to a broker to pay losses on gambling speculations is void and not enforceable. *Walters v. Comer*, 79 Ga. 796 (1887). But see *Crawford v. Spencer*, 92 Mo. 498 (1887). Where a citizen of Alabama gives to a New York broker a deed of land in Alabama in settlement of futures, its validity as to the futures depends on the law of New York. *Hubbard v. Sayre*, 105 Ala. 440 (1895).

¹ *Steers v. Lashley*, 6 T. R. 61 (1794). *Rawlings v. Hall*, 1 Car. & P. 11 (1823), holds that the broker on the witness stand need not admit that the consideration was a gambling debt, since it would subject him to a common-law criminal prosecution.

² *Tenney v. Foote*, 95 Ill. 99 (1880).

³ *Tenney v. Foote*, 95 Ill. 99 (1880).

See also *Fareira v. Gabell*, 89 Pa. St. 89 (1879). But where, upon the close of a successful "corner," which is illegal by statute, one of the parties leaves his share of the profits with the other party to invest, the latter must account for it when called upon so to do. Where, upon the close of an unsuccessful "corner," the parties losing settle among themselves, but one of them fraudulently overstates the losses, he is liable to account for the amount fraudulently allowed him. *Wells v. McGeoch*, 71 Wis. 196 (1888).

⁴ *Jamieson v. Wallace*, 167 Ill. 388 (1897).

⁵ See ch. IX, *supra*. In the important case of *Western Bank v. Addie*, L. R. 1 H. L. (Sc.) 145 (1867), part of the shares had been subscribed for and part purchased. The court applied the same principle to both.

amount to fraudulent misrepresentations. The courts, consequently, let each case stand upon its own facts. Certain states of fact have, however, been passed upon as constituting fraud, and as such they aid in coming to a conclusion on facts in somewhat similar cases. Thus, it has been held to be a fraudulent representation to make false statements as to the location, explorations, and developed state of a mine;¹ or that a patent owned by the company was of great value, and that certain other persons were owners of stock;² that the company was prosperous, when in fact large overissues of stock had been made;³ or that the corporate property was free from incumbrance;⁴ or that the corporation would guarantee certain divi-

¹ *Morgan v. Skiddy*, 62 N. Y. 319 (1875). In *Crocker v. Manley*, 164 Ill. 282 (1896), the court held that it was not fraudulent to represent that the mines owned by the company were rich and would pay more than twenty per cent dividends, and that the ore on hand was of a certain value, where it is shown that the vendee made a personal examination and was satisfied, and no actual fraud is shown. Rescission was refused.

² *Miller v. Barber*, 66 N. Y. 558 (1876).

³ *Cazeaux v. Mali*, 25 Barb. 578 (1857). False representations as to solvency and financial condition of the corporation are material, and the purchaser may testify that he would not have purchased the stock except for the representations. *Pridham v. Weddington*, 74 Tex. 354 (1889). It is fraud to state falsely that the company is prosperous, that there was no stock for sale, and that defendant was selling stock of others and not his own. *Miller v. Curtiss*, 13 N. Y. Supp. 604 (1891).

⁴ *Southwestern R. R. v. Papot*, 67 Ga. 675, 693 (1881), the court saying: "It is, we think, sufficient to show that the misrepresentation or suppression of fact was of such a nature as to prove that the property purchased was of no value to the purchaser for the purposes for which it

was bought, or that it would be reasonable to suppose that the purchaser would not have contracted for it had he had knowledge of the existence of this defect." It is fraudulent to make misstatements to the effect that the corporation is out of debt and is making certain profits. It is no defense that the defendant might have ascertained the facts from the corporation. *Redding v. Wright*, 49 Minn. 322 (1892). Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay, except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds. *Bank v. Byers*, 41 S. W. Rep. 325 (Mo., 1897). A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought. *Stevenson v. Marble*, 84 Fed.

dends;¹ or any false statement or general fraudulent act, or fraudulent concealment of a material fact, whereby the purchaser is induced to complete the sale of stock.² It may or may not be a fraudulent representation to state that the stock is worth a certain sum.³

Rep. 23 (1897). A purchaser of a majority of the stock of the corporation from a stockholder may rescind where a misrepresentation was made that the corporation had practically no debts. *Merritt v. Ehrman*, 22 S. Rep. 514 (Ala., 1897).

¹ *Gerhard v. Bates*, 20 Eng. L. & Eq. 129 (1853). Representations that dividends would soon be paid are not fraudulent, but statements as to present condition and prospects may be for the jury. *Warner v. Benjamin*, 89 Wis. 290 (1895).

² See further illustrations in ch. IX, *supra*. Declaring a dividend in good faith and sound discretion is not fraud by reason of its turning out to have been ill-advised. *Burnes v. Pennell*, 2 H. L. Cas. 497 (1849). A representation that the stock "is good property or investment and is about to make a dividend" is a false representation when untrue, and where the person taking the stock as trustee from a preceding trustee objected to receiving it on account of his doubt or ignorance as to its character. *Lawton v. Kittredge*, 30 N. H. 500 (1855). Representations that a corporate property is valuable and one of the best properties in Colorado, when in fact the company was a bubble company, raises a question of fraud for the jury to pass upon. *Bradley v. Poole*, 98 Mass. 169 (1867). The payment of an excessive and speculative price for stock is not fraud and is no ground for setting the sale aside. *Moffat v. Winslow*, 7 Paige Ch. 124 (1838). The vendor warrants the title to the stock, but not its quality or value. *Allen v. Pegram*, 16 Iowa, 163 (1864). A sale of stock in a company formed to pur-

chase a railroad cannot be set aside merely because its title to the railroad fails. *State v. North Louisiana*, etc. R. R., 34 La. Ann. 947 (1882). In *Wright's Appeal*, 99 Pa. St. 425 (1882), it was held that the corporation was not liable for the conversion of stock by its president, who obtained the certificates indorsed in blank from the owner on false representations that the corporation wished to use them. *Newlands v. National, etc. Assoc.*, 53 L. T. Rep. 242 (1885); *March v. Eastern R. R.*, 43 N. H. 515 (1862), holding that the fact that the earnings were not distributed by dividends until after a sale of stock does not constitute fraud. A confidential agent who uses his position to obtain stock of which the principal has been deprived wrongfully must turn it over to the principal. *Hardenbergh v. Bacon*, 33 Cal. 356 (1867). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern, and concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business, and statements leading to the conclusion that all subscribers for stock stood on an equal footing, constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. *Walker v. Anglo-Am. etc. Trust Co.*, 72 Hun, 334, 341 (1893).

³ That it is not, see *Union Nat. Bank v. Hunt*, 76 Mo. 439 (1882). A

It is a fraud on the vendee of stock to sell him as paid-up stock that which is not paid up, although issued as paid up, the vendor having participated in the issue.¹ It is fraud in the vendor to represent that property is to be turned in by him to the corporation at a certain price and then to refuse to carry out the latter contract.² Where the vendor agrees to sell at a value to be ascertained by an examination of the corporate books and affairs, it is fraud in the vendee to cause false memoranda to be made by the employees of the corporation.³ It is not fraud, however, for a director or other corporate officer to

false representation that the stock sold is worth eighty cents on the dollar—it being worth but forty cents—will not sustain an action for deceit. *Ellis v. Andrews*, 56 N. Y. 83 (1874). It is fraudulent to represent that the stock is worth par when in fact it is worthless. If the vendor persuades the vendee to make no inquiries, the latter may recover, although he made none. The measure of damages is not the value of the land given for the stock, but the difference between the actual and the represented value of the stock. *Nysegander v. Lowman*, 124 Ind. 584 (1890). False representations may consist of statements that the stock is worth a certain price and is sold to plaintiff at a reduced price in order to obtain his services. *Maxted v. Fowler*, 94 Mich. 106 (1892). False statements as to the value of stock and the dividends it would pay and the purpose for which it was incorporated are sufficient to sustain rescission. *Murray v. Tolman*, 162 Ill. 417 (1896). Misrepresentations as to the value of the stock and the condition of the company are material. *Blacknall v. Rowland*, 116 N. C. 389 (1895). The statements by the vendor of what purports to be a certificate of bank stock, that the bank was organized and that the stock was worth par, and that the vendor knew this to be the case because he was one of the first stockholders, and that the stock was a

good high dividend-paying stock, constitute a warranty, and the vendee may sue for damages if the facts are not as stated, the measure of damages being the difference between the value of the stock as represented and its actual value. *Titus v. Poole*, 73 Hun, 383 (1893). Where an heir sells stock at a nominal figure, it being considered worthless, and then learns that it has value and buys it back at a low figure on his statement that it had no value and that he wished to keep it on account of its having been held by his father, an action for damages for deceit lies. *Edelman v. Latshaw*, 180 Pa. St. 419 (1897). Cf. S. C., 159 Pa. St. 644 (1894). See 50 N. E. Rep. 623.

¹*Sturges v. Stetson*, 1 Biss. 246 (1858); S. C., 23 Fed. Cas. 311, holding that the vendee is not liable on a note given in payment thereof; *Fosdick v. Sturges*, 1 Biss. 255 (1858); S. C., 9 Fed. Cas. 501, holding that the vendee may recover back money paid; *Reeve v. Dennett*, 145 Mass. 23 (1887), where the capital of \$1,000,000 was issued for a worthless patent; holding also that the misrepresentations may invalidate also a second and subsequent purchase of stock, even though in the meantime the vendee has become a director in the corporation.

²*Seaman v. Low*, 4 Bosw. 337 (1859).

³*Hager v. Thomson*, 1 Black, 80 (1861).

buy or sell stock at a profit, due to his official knowledge of the condition of the corporation;¹ nor to obtain the stock by a threat of a call.² The fact that a check given in payment for stock is not honored, although the money is in bank, is not fraud where payment was refused because of other frauds of the vendor;³ nor is it fraud to issue certificates before anything has been paid thereon, there being no participation by the vendor.⁴ It is fraud, however, to represent the company as having a full-paid capital stock when in fact the stock was wholly issued in payment of a worthless mine. The person making such representation is liable to the vendee.⁵ It is fraudulent for a vendor to represent that he is selling the stock of others, when in fact he is selling his own stock.⁶ Statements that the stock sold is treasury stock, and that others paid the same price to the treasury, are material.⁷ A representation as to the cost of the stock,

¹ *Tippecanoe County v. Reynolds*, 44 Ind. 509 (1873). Where one of the partners in the building of railroads, and in owning stocks, bonds, etc., dies, and his executor, after an examination of all the assets by means of experts, etc., makes a settlement with the other partner, such settlement is binding although the other partner did not impart all the knowledge or information he might have given. The subsequent rise in value of some of the securities is immaterial. *Colton v. Stanford*, 82 Cal. 351 (1890). The purchaser of stock from the secretary of the company cannot rescind on the ground of fraud, the secretary having given at the time of the sale all the information which he had concerning the company. No confidential or fiduciary relation exists. *Krumbhaar v. Griffiths*, 151 Pa. St. 223 (1892). And see § 320, *supra*.

² *Grant v. Attrill*, 11 Fed. Rep. 469 (1882). As to other cases of fraud by the vendee, see *Johnson v. Kirby*, 65 Cal. 482 (1884); *Hempfling v. Burr*, 59 Mich. 294 (1886).

³ *Comins v. Coe*, 117 Mass. 45 (1875).

⁴ *Woodruff v. McDonald*, 33 Ark. 97 (1878).

⁵ *Cross v. Sackett*, 2 Bosw. 617 (1858). See also, §§ 40, 48, *supra*; *Colt v. Woollaston*, 2 P. Wms. 154 (1723). When a promoter misrepresents to a subscriber the price paid by the promoter for property conveyed by him to the company, the subscriber may sue him for damages. *Teachout v. Van Hoesen*, 76 Iowa, 113 (1888). A sale or pledge of stock stamped "non-assessable," when in fact it was not legally paid up, renders liable for false representations the president and secretary who made such sale or pledge and who knew that it was not paid-up stock. *Windram v. French*, 151 Mass. 547 (1890).

⁶ *Mayo v. Knowlton*, 134 N. Y. 250 (1892); *Maturin v. Tredinnick*, 2 New Rep. 514 (1863). Where a person, upon the statement of the president that the company has no stock for sale, but will get some, authorizes the president to buy for him, and the president turns out stock which the company already has, the contract is voidable by such vendee. *McDoel v. Ohio, etc. Co.*, 36 S. W. Rep. 175 (Ky., 1896).

⁷ *Caswell v. Hunton*, 87 Me. 277 (1895).

with an agreement to sell at cost, is different from an agreement to sell at a fixed figure which is represented to be cost. A misrepresentation as to the cost of the stock to the vendor is not actionable.¹ The fact that the only property that the company owns consists of worthless patents, being infringements on other patents, is no defense to notes given for stock, there being no warranty or fraud. The value is immaterial.² Although a contractor, taking stock and bonds in payment for work, subcontracts the work for the stock and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock.³ A vendor of stock is not bound to tell the vendee that the company is insolvent, even though the former knew that fact at that time.⁴ A misstatement as to what the corporation received for the stock issued by it is material.⁵ A statement that the vendor is selling at the same price to others is fraudulent if such is not the case.⁶ Where several subscribers refused to take their stock, and finally, to induce them to do so, a party agrees secretly with one of them to purchase his holdings, such an agreement may be enforced.⁷ A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company, and that thereby the vendee was induced to make the contract of purchase at an unconscionable price.⁸

There are various facts which constitute fraud herein, and various principles of law applicable to the remedy to be pursued. Such cases are arising constantly, and the various decisions on this subject are given in the notes below.⁹

¹ *Gassett v. Glazier*, 165 Mass. 473 (1896).

² *Watts v. Stevenson*, 165 Mass. 518 (1896).

³ *McLane v. King*, 144 U. S. 260 (1892). A contractor taking payment in stock cannot complain that the property was foreclosed under a mortgage which he assented to. *Kelley v. Collier*, 11 Tex. Civ. App. 353 (1895).

⁴ *Rothmiller v. Stein*, 143 N. Y. 581 (1894); *Jones v. Garlington*, 44 S. C., 533 (1895). See also § 335, *supra*.

⁵ *Hoxie v. Small*, 86 Me. 23 (1893).

⁶ *Kilgore v. Bruce*, 166 Mass. 136 (1896).

⁷ *Traphagen v. Sagar*, 63 Minn. 317 (1895).

⁸ *Delano v. Rice*, 23 N. Y. App. Div. 327 (1897).

⁹ Where a debtor turned over to his creditor, as trustee, the controlling stock of a corporation, for the latter to manage, and the latter afterwards, by threats of abandoning the enterprise, forced the debtor to sell him the stock outright, a court of equity will set aside such sale and hold the creditor liable as a trustee. *Ryle v.*

Even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty

Ryle, 41 N. J. Eq. 582 (1886). A failure of the vendor to state that the company is a joint-stock association and not a corporation is not fraud avoiding the sale of the stock. *Curtiss v. Hurd*, 30 Fed. Rep. 729 (1887). A director selling stock cannot be defeated in his action for the price by reason of fraudulent representations of the corporate treasurer inducing defendant to purchase. *Doane v. King*, 30 Fed. Rep. 106 (1887). It is a question for the jury whether it was fraud in representing that the stock was paid up, when in fact the first payment only had been made, and the balance had been paid by dividends. *Kryger v. Andrews*, 65 Mich. 405 (1887). Fraud may be by directors in fraudulently making dividends. See ch. XXXII, *infra*. Where, after an agreement to sell land for stock, the owner of the stock attends a corporate meeting and votes to sell all corporate property at sixty cents on the dollar, which is done, the purchaser of the stock may have the land returned. *Harris v. Piatt*, 64 Mich. 105 (1887). Cases of fraud on the part of the vendee sometimes occur, where the vendee is given a majority of the stock, and then uses his control of the corporation to defraud the vendor in the execution of his contract to pay for the stock. *Hardenbergh v. Bacon*, 33 Cal. 356 (1867). A jury decided that a false representation, on the part of corporate officers, that the company was without debt, was a fraud on the vendee, and held its perpetrators liable in damages. *Faville v. Shehan*, 68 Iowa, 241 (1885). Fraud may be by the agent's representations as to the cost of mining the coal, of transportation and of the market price. *Booth v. Smith*, 117 Ill. 370 (1886). On a question of testimony by the

defendant, see *Reeve v. Dennett*, 141 Mass. 207 (1886). It has been held that one who was induced by fraud to purchase stock in an insolvent corporation may bring suit to have his part of the corporate assets ascertained, to the exclusion of a debt due from the corporation to the person inducing him to purchase. *Poole v. West Point, etc. Assoc.*, 30 Fed. Rep. 513 (1887). A person making sales of stock by false representations may be indicted for obtaining money by false representations. *Commonwealth v. Wood*, 142 Mass. 459 (1886). The statute of frauds as to the answering to the debt, defaults, etc., of another person has no application to a sale of stock herein. The fact that the corporate property sold several years later for a small amount is immaterial and not admissible. *French v. Fitch*, 67 Mich. 492 (1887). A misstatement as to the reason why the vendee purchases is not material. *Byrd v. Rautman*, 36 Atl. Rep. 1099 (Md., 1897). Where an insolvent pledgor sells the pledge to the pledgee for the debt itself, \$7,000, the transaction is legal, even though a jury find that the stock was worth \$1,500 more. *Wachovia L. & T. Co. v. Forbes*, 27 S. E. Rep. 43 (N. C., 1897). Where a stockholder sells a controlling interest to a person who is to pay therefor by improving the corporate property, but who elects a board of directors and defrauds the vendor, the latter's remedy is a difficult one. *Cates v. Sparkman, etc. Co.*, 73 Tex. 619 (1889). The fraud or mistake must have been such that the agreement would not have been made in its absence, where a rescission of the contract is sought by decree. *Means v. Rees*, 26 Fed. Rep. 210, 216 (1886). Where an agent to sell a mine induces his principals to place

of money would be forthcoming to take the stock of the company and make the business successful, and even though the

in his name all their stock, and he sells the property and accounts to them for part only of the price, and refuses to return the stock, they may sue him for an accounting without previously tendering back the amount they received or demanding the stock. *Wooster v. Nevills*, 73 Cal. 58 (1887).

False representations as to the corporate property, business, and prospects, and the use of a corporate prospectus which the vendee knows contains false statements, sustain rescission of transfer of land for stock. A person purchasing the land with full knowledge of the fraud is not protected. The certificates may be filed with the clerk of the court, awaiting the retransfer of the land. *Ormsby v. Budd*, 72 Iowa, 80 (1887). The vendee of stock cannot rescind or collect damages on the ground that the corporation was not legally incorporated. If it is a *de facto* corporation the vendor is not liable. *Harter v. Eltzroth*, 111 Ind. 159 (1887). The vendee of stock for which he gave real estate may have a reconveyance of the real estate decreed, where the sale of stock was induced by fraudulent representations. *Gray v. Robbins*, 11 Atl. Rep. 860 (N. J., 1887). A managing director who buys stock on credit, and then aids in levying an attachment on the stock against the vendor and conceals the same from the vendor, and buys in the stock at a low price, and then repudiates his debt to the vendor, is guilty of fraud. *Young v. Fox*, 37 Fed. Rep. 385 (1888). Where the president in selling stock makes false representations, the vendee is not bound to investigate them. He may defeat a note given in payment. *Wannell v. Kem*, 57 Mo. 478 (1874). A representation that a bond is an

"A No. 1" bond is not a material representation. *Deming v. Darling*, 148 Mass. 504 (1889). See also instances in § 334, *supra*. The vendee fails in his suit for damages if he does not contradict the defendant's testimony that the plaintiff vendee knew all the facts at the time of the sale. *Nelson v. Luling*, 62 N. Y. 645 (1875), *aff'd* 36 N. Y. Super. Ct. 544.

A statement on April 10 that the last semi-annual dividend was seven per cent, and that the fiscal year ended on June 1, is a fraudulent suppression of the truth where but one dividend had been declared, and that twenty-two months before the date of the statement. *Tyler v. Savage*, 143 U. S. 79 (1892). Where the contract of sale contains express warranties, parol representations as warranties are not admitted to prove false representations. *Humphrey v. Merriam*, 46 Minn. 413 (1891). A statement filed with the state commissioner as required by statute, in regard to the amount of the paid-up stock, is not such a representation as will sustain an action for damages for fraudulent representations inducing a person to take the notes of the company. *Hunnewell v. Duxbury*, 154 Mass. 286 (1891). The fact that statements as to the affairs of the company are not filed as required by statute does not amount to fraud in the sale of stock; nor do representations that the stock will pay twenty per cent dividends amount to fraud. The question as to the validity of stock having once been litigated cannot be again raised in an action for deceit in the sale of the stock. The mere act of conspiracy is not sufficient to sustain the action unless damage is shown. *Robertson v. Parks*, 76 Md. 118 (1892). A representation, in a transaction involv-

parties making such representations do not advance the money, but allow the company to become insolvent and buy in the as-

ing water-company stock, as to the amount of water that can be obtained is material. A tender of the certificates is sufficient where there has been no transfer on the books. *Hill v. Wilson*, 88 Cal. 92 (1891). Expressions of opinion as to the future, although exaggerated, are not representations. *Columbia Electric Co. v. Dixon*, 46 Minn. 463 (1891). Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without consideration and void. *Clemshire v. Boone County Bank*, 53 Ark. 512 (1890).

Where stock is issued to several persons for a patent, and they return part of it to a trustee for the company to sell for working capital, and a subscriber to the company's stock gives his note to the company, and the company indorses the note to one of the first-named parties, who turns out his own stock to fill the subscription, the latter may recover on the note, and is not liable for false representations of one of his associates and an agent of the company. *King v. Doane*, 139 U. S. 166 (1891). A sale of stock will not be set aside on the ground of inadequacy of price unless so gross as to shock the conscience and give decisive evidence of fraud. *Perry v. Pearson*, 135 Ill. 218 (1890). It is not sufficient to prove that defendants managed the manufacturing business of the company, to sustain an action for fraud in stating that the company was doing a good business and making ten per cent, it appearing that the business was new, and defendants did not state that they knew of the financial condition. *Hatch v. Spooner*, 13 N. Y. Supp. 612 (1891). A vendor of stock may collect the price although the stock was worthless and

known so to be by the vendor. *Hunting v. Downer*, 151 Mass. 275 (1890). A statement that drill-holes in coal-fields showed certain results are material, and not matters of opinion. *Martin v. Hill*, 41 Minn. 337 (1889). Where a banker sells stock to a lawyer and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. *Daly v. Brennan*, 87 Wis. 36 (1894). A vendee who is in the employ of the company and has opportunity to know all about it cannot claim that he was deceived as to the value of the stock. *Weaver v. Shriver*, 79 Md. 530 (1894). It is not fraud on the vendee that his vendor took the stock from the corporation and paid for it with funds embezzled from another party. The corporation is not liable for the fraud of the president in selling his own stock. *Dunn v. State Bank*, 59 Minn. 221 (1894). A sale of bonds is not revocable even though invalid and the vendor innocently stated that they were valid. *Ruohs v. Third Nat. Bank*, 94 Tenn. 57 (1894). False statements as to the condition of the company constitute fraud. *Carruth v. Harris*, 41 Neb. 789 (1894). In *Ritchie v. McMullen*, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor

sets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise.¹

may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it that the proofs did not sustain the allegations. The purchasers of stock which they suppose is the original capital stock, but which is really increased capital stock, cannot sustain a bill to cancel the original capital stock, even though the latter is held by the parties who issued the increased stock without amending the charter as required by statute. *Byers v. Rollins*, 13 Colo. 22 (1889). The fact that the company has not paid dividends does not prove that a representation that it was making ten per cent profit was false. *Hatch v. Spooner*, 1 N. Y. App. Div. 408 (1896). Where the president induces a stockholder to give up his stock on repayment of the amount paid thereon, on the representation that another party will take all the stock and complete the enterprise, and the fact is that the president himself gets some of the stock so surrendered, a stockholder may have the agreement canceled. *Simrall v. Williamson*, 35 S. W. Rep. 632 (Ky., 1896). In *Kountze v. Kennedy*, 147 N. Y. 124 (1895), an action was brought by a vendee of stock and bonds against an officer of the company, who upon the application of the vendee, before the purchase

was made, made a false statement of the liabilities of the company. The suit, being at law, failed, because no fraudulent intent was proved. Where two parties exchange securities of various kinds, and in the contract to that effect place a value upon the same, there is no fraud arising from the fact that the value given to particular stocks is greater than their actual value, the transaction really being one of barter. *Rockefeller v. Merritt*, 76 Fed. Rep. 909 (1896). Although a statement is made that a certain amount of money had been paid in, yet where other statements show clearly that this was not so, no cause of complaint exists. *McEachern v. Western Transp., etc. Co.*, 97 Mich. 479 (1893). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. *Manville v. Lawton*, 19 N. Y. Supp. 587 (1892). The purchaser of bank stock may rely upon the statement of its president as to the bank's condition, and, the purchase having been from the bank itself, it may be rescinded. *Merrill v. Florida, etc. Co.*, 60 Fed. Rep. 17 (1893). An action for fraud in inducing plaintiff to buy stock of defendant is defeated by proof that the stock was sold by the corporation itself. *Hubbard v. Long*, 105 Mich. 442 (1895).

¹*Smith v. Parker*, 45 N. E. Rep. 770 (Ind., 1897). A promise of employment is not fraud, even though not performed. *Hubbard v. Long*, 105 Mich. 442 (1894).

Fraud in the sale of stock frequently arises in the organization of the company. The parties who cause the company to be organized are called the "promoters" of it. As such they are disqualified from making a profit by selling property to the company at a much larger price than they gave for the property. The promoters act in a fiduciary capacity. Hence, when they have made a profit at the expense of the company, they may be compelled to turn over that profit to the company, or, if they have sold stock of the company, the purchasers of the stock from them may rescind the purchase and hold them personally liable therefor.¹

It may be fraudulent for the directors to issue to themselves shares of the company's unissued stock in order to control elections or to make a profit.²

An agent is not liable for misrepresentations made by his principal, but it may be a question of fact whether the vendor is a principal or agent.³ A contract in regard to stock may be illegal in itself, as, for instance, a contract to use stock to rob a railroad and bribe a judge.⁴

§ 351. *Fraudulent sale by agent, etc., in breach of trust.*—A *bona fide* purchaser for value and without notice of stock from a vendor who delivers the certificates therefor indorsed in blank by another, or indorsed by the vendor himself, is protected and entitled to the stock, although it afterwards transpires that the agent was selling as agent of another and had been guilty of a breach of trust.⁵ But the transferee is not protected where he

¹See ch. XLIII, §§ 705-708, *infra*.

²See § 70, *supra*.

³See § 334, *supra*.

⁴*Tobey v. Robinson*, 99 Ill. 202 (1881). Although a stockholder has transferred certain stock to the president to be used to bribe governmental officials in obtaining a renewal of governmental contracts with the corporation, yet the stockholder may recover back the stock, it not having been used for that purpose. *Mulvane v. O'Brien*, 49 Pac. Rep. 607 (Kan., 1897). Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more

than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same, and the court will enforce this agreement. *Scott v. Scott*, 38 Atl. Rep. 567 (N. H., 1894).

⁵*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 (1871). This is not only the leading case on the estoppel of the principal from repudiating the sale or pledge of his stock by his agent, whom he entrusted with the certificates indorsed in blank, but it is one of the leading cases on the law of the quasi-negotiability of stock. *Honold v. Meyer*, 36 La. Ann. 585 (1884); *Strange v. Houston, etc. R. R.*, 53 Tex.

is not a *bona fide* purchaser.¹ Where the same person acts as agent for both the transferrer and the transferee, and absconds with the purchase price after the certificates have been delivered, but before registry on the corporate books, the transferee is protected.² Where the corporation knows that the vendor is selling as the agent of the stockholder, who has given to the agent the certificates indorsed in blank, it must see to it that

162 (1880); *Dovey's Appeal*, 97 Pa. St. 153 (1881). Where certificates of stock are deposited with the broker, duly transferred in blank, a *bona fide* holder of such certificates from the broker is not protected as against the real owner, where the facts were sufficient to give him notice. *Ryman v. Gerlach*, 153 Pa. St. 197 (1893); and see many cases in chapter XXV, *infra*, where this principle of law is often involved. The case of *Taylor v. Great Indian*, etc. R'y, 4 De G. & J. 559 (1859), to the contrary, turns on the English doctrine that transfers in blank are not valid. The case of *Donaldson v. Gillot*, L. R. 3 Eq. 274 (1866), where the pledgee of one who held the certificate indorsed to himself was not protected, since the pledgor had purchased as agent and had fraudulently taken title in his own name, would not be good law in this country, where the failure to have the transfer registered has no effect on the pledgee's rights under such circumstances. *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. D. 194 (1877), where a broker committed a breach of trust. The court said the stockholder "is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made." *Moodie v. Seventh Nat. Bank*, 3 W. N. Cas. 118 (1876),

holding that if the purchaser takes partly for an antecedent debt he is not a *bona fide* holder to that extent. See also *Dovey's Appeal*, 97 Pa. St. 153 (1881). The books are full of cases wherein an agent has committed a breach of trust in the sale of stock. For many instances of this kind of fraud and the various principles of law applicable thereto, see ch. XIX, *supra*, and chs. XXII and XXIV, *infra*. An assignee in insolvency of the agent does not take the stock. See § 320, *supra*. An agent to collect dividends who loans the stock at a profit is liable for its loss, even though he informed the owner of the loan and she did not object. *Persch v. Quiggle*, 57 Pa. St. 247 (1868). A *bona fide* purchaser from the agent is protected. *State Bank v. Cox*, 11 Rich. Eq. (S. C.) 344 (1860); *West Branch, etc. Co.'s Appeal*, 81½ Pa. St. 19 (1870); *Otis v. Gardner*, 105 Ill. 436 (1883); *Zulick v. Markham*, 6 Daly, 129 (1875); *Martin v. Sedgwick*, 9 Beav. 333 (1846); *Linnard's Appeal*, 6 East. Rep. 877 (Pa., 1886).

¹*Talmage v. Third Nat. Bank*, 91 N. Y. 531 (1883); *Crocker v. Crocker*, 31 N. Y. 507 (1865); *Weaver v. Barden*, 49 N. Y. 286 (1872), where the agent fraudulently bought in his own name and then fraudulently sold; *Williamson v. Mason*, 12 Hun, 97 (1877). Purchaser from agent with notice of fact that he held as agent, and that he had sold to himself, is not protected. *Bank of Louisville v. Gray*, 84 Ky. 565 (1886).

²*Ex parte Shaw*, L. R. 2 Q. B. D. 463 (1877).

the agent has full power to sell the stock, and is liable for allowing a registry where the agent has not such power.¹ If the principal authorized the sale or ratified it, he of course cannot afterwards complain.² Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made.³ Where a customer may rescind a purchase of stock made for him by his broker, when he discovers that the broker sold him stock owned by such broker, the customer, if he has exchanged such stock for reorganization stock, may tender back old stock which he borrows for that purpose.⁴ In England the courts do not protect a purchaser of certificates of stock unless the latter has not only purchased, but has obtained a registry on the corporate books.⁵

An agent's power to sell stock does not authorize him to pledge it.⁶ A person who knows, or has the means of knowing, that another person holds stock as an agent only, cannot take such stock in pledge from the agent, although the latter represents that the money is to be used for his principal. The principal may recover the stock if he has not authorized the pledge.⁷

¹ Woodhouse v. Crescent Mut. Ins. Co., 35 La. Ann. 238 (1883), holding also that the transferee who is charged with receiving with notice may be joined as a party defendant; St. Romes v. Levee, etc. Co., 127 U. S. 614 (1888).

² As to the admissibility in evidence of receipt showing that agent was authorized to sell by order of the principal's brother, see Dwyer v. Fuller, 144 Mass. 420 (1887). Pledge of stock by agent is not a conversion, where the principal receives without objection and retains a receipt from the agent setting forth such pledge. Metcalf v. Williams, 144 Mass. 452 (1887).

³ Edison v. Gilliland, 42 Fed. Rep. 205 (1890).

⁴ Mayo v. Knowlton, 134 N. Y. 250 (1892).

⁵ In England it is held, even in regard to American certificates of

stock, that a *bona fide* purchaser of certificates of stock, duly indorsed, from an agent selling in breach of faith, is not protected until registry is obtained. Colonial Bank v. Hepworth, L. R. 36 Ch. D. 36 (1887). But see Williams v. Colonial Bank, L. R. 36 Ch. D. 659 (1887); and see Easton v. London J. S. Bank, L. R. 34 Ch. D. 95 (1886). Even in England, if a broker transfers stock in breach of trust to a bank, and the bank afterwards, at his request, transfers the stock to another person, the bank, being ignorant of his agency, is not liable to the principal for the value of the stock. Marshall v. National, etc. Bank, 66 L. T. Rep. 525 (1892). See also §§ 378, 379, 416, *infra*.

⁶ Merchants' Bank v. Livingston, 74 N. Y. 223 (1878). See §§ 321, 326, *supra*.

⁷ Fisher v. Brown, 104 Mass. 259 (1870).

A *bona fide* purchaser of certificates of stock from a pledgee is similarly protected.¹

§ 352. *Fraud may be by corporate reports or prospectus.*—A report of corporate officers to the stockholders, setting forth the condition of the affairs of the corporation, is deemed to be a statement to the public also, and it may be relied upon by any one in purchasing shares. This principle of law was first clearly established in England in 1860, in the case of *Davidson v. Tulloch*.¹ It was there held that there need be no privity between the officers issuing the report and the person purchasing shares of stock from third persons. If such purchaser made his purchase relying upon material statements in corporate reports which were false, he has his remedy against all persons who knowingly made or issued the report.² The leading case in this country on the liability of corporate directors for fraudulent representation as to the condition of the company, not made to a purchaser of stock personally, but to the public generally, is *Cross v. Sackett*,³ decided in 1858, where fraudulent

¹ See § 473, *infra*. A bank taking a pledge of negotiable bonds in good faith may hold them, though it turn out that the pledger was not the owner of them, but held them as security that a mortgage would be canceled. *Saloy v. Hibernia Nat. Bank*, 39 La. Ann. 90 (1887). As to sales by trustees, etc., see ch. XIX, *supra*.

¹ 6 Jur. (N. S.) 543; S. C., 3 Macq. (H. L.) 783.

² *Scott v. Dixon*, 29 L. J. (Exch.) 62, n. (1859), explained in *Peek v. Gurney*, L. R. 6 H. L. 398 (1873), as follows: "The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the

director;" *Gerhard v. Bates*, 20 Eng. L. & Eq. 129 (1853); *Cullen v. Thomson*, 6 L. T. Rep. 870 (1862), holding that, where directors of a joint-stock company issue false and fraudulent reports to the public, and the manager, secretary, and other officers of the bank supply the detailed statements for such report, knowing them to be false and that they are to be used for purposes of deceit, and a third party, acting on such reports, purchases shares in the company and suffers loss thereby, each of the officers of the company who knowingly assisted in the fraud is personally liable to such third party for the loss caused by such misrepresentation in the report, though the report was signed only by the directors and not by the subordinate officers.

³ 2 Bosw. 617; 6 Abb. Pr. 247; 16 How. Pr. 62, the court saying: "When an instrument is made to deceive the public generally, and is adapted, as well as intended, to deceive some portion of the public, and as well

dividends and representations based thereon were made. The president is liable in an action of deceit where he sells stock after referring the purchaser to a published statement of the corporation signed by him, which statement was false. Where,

one person as another, and is used as it was designed it should be, and fraudulently induces some one to act to his prejudice by acting in the mode it was intended to influence them to act who might be deceived by it, the person who made the instrument and caused it to be thus fraudulently used is liable to the person who has been defrauded by it. In such a case the person injured has been subjected to damage by his fraudulent acts, and the fraudulent wrong-doer is liable for the consequences." In *Cazeaux v. Mali*, 25 Barb. 578 (1857), the court said: "It is not essential that the representation should be addressed directly to the plaintiff; if it were made with the intent of its influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated, but they must have come to a knowledge of it before their purchase." In *Morse v. Swits*, 19 How. Pr. 275 (1859), a bank officer was held liable for false statements in a report published in accordance with the requirements of a statute, the court saying: "Being published, the public, or any individual of the public, has a right to believe it. . . . And if, believing it, any one of the public acts on that belief, the makers and publishers of this falsehood are to be held liable for the consequences they have caused." (See cases cited in Reporter's note to the foregoing.) See also *Salmon v. Richardson*, 30 Conn. 330 (1862); *Fenn v. Curtis*, 23 Hun, 334 (1881), holding corporate secretary liable to purchaser of shares

from an individual, the secretary having signed the certificate of stock and also a circular stating that the corporation was a corporation, when in fact it was not. And see §§ 40, 43, *supra*. A person buying stock in what was supposed to be a corporation, but is a partnership, cannot recover back his money from all of the participants. *Perry v. Hale*, 143 Mass. 540 (1887). A corporation is not liable for misrepresentations of the president in selling stock belonging to himself. *Prosser v. First Nat. Bank*, 106 N. Y. 677 (1887). Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal, The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. *Compton v. Chelsea*, 128 N. Y. 537 (1891). The fact that the false statements as to the condition of the corporation are made to a director, who is acting as agent for the vendee, is not fatal to the suit for fraud. *Trimble v. Ward*, 97 Ky. 748 (1895). A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable in an action for damages for deceit, on the ground that its published statements were false and fraudulent, and that he relied on those statements. *Merchants' Nat. Bank v. Armstrong*, 65 Fed. Rep. 932 (1895). A vendor who sells knowing that the corporation has issued a false report that it was earning two per cent a month, and that the vendee relied on this report, is guilty of fraud, and the sale may be rescinded.

however, the sale is to a director, such a director is bound to show that he did not know the statement was untrue, and he may show that fact although he also signed the statement.¹

§ 353. A somewhat different rule prevails in England as to false statements contained in a prospectus of a corporation. A prospectus is issued for the purpose of inducing persons to subscribe for stock. Its object is not to promote the sale of that stock. Accordingly it was decided in *Peek v. Gurney*,² in 1873, that "the purchaser of shares in the market, upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by action upon it, so connect himself with them as to render them liable to him for the misrepresentation contained in it, as if it had been addressed personally to himself." In New York a directly opposite rule prevails. In the case of *Morgan v. Skiddy*,³ in 1875, the court of appeals held that, "if the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the per-

Foley v. Holtry, 43 Neb. 133 (1894). A person who purchases bank stock from the bank itself may hold the bank liable for damages where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. *Exchange Bank v. Gaitskill*, 37 S. W. Rep. 160 (Ky., 1896). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a mandamus to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. *Investment Co. v. Eldridge*, 2 Pa. Dist. 394 (1893).

¹ *Ward v. Trimble*, 44 S. W. Rep. 450 (Ky., 1898). The president is liable in an action for deceit where he sells stock of the bank of which he is president, and which has published a false statement of its condition by

order of the president and others. *Trimble v. Reid*, 41 S. W. Rep. 319 (Ky., 1897). In an action at law the directors are not liable to a person who purchases stock, relying on the directors' report, unless fraudulent intent is proved. *Parker v. McQuesten*, 32 Q. B. Rep. (Can.) 273 (1872).

² L. R. 6 H. L. 377, overruling *Bagshaw v. Seymour*, 18 C. B. 903 (1856), and *Bedford v. Bagshaw*, 4 H. & N. 538 (1859); explaining *Scott v. Dixon*, 29 L. J. (Exch.) 62, n. (1859), and *Gerhard v. Bates*, 2 El. & Bl. 476 (1853), and itself explained in *Cargill v. Bower*, L. R. 10 Ch. D. 502 (1878). In *Bellairs v. Tucker*, L. R. 13 Q. B. D. 563 (1884), the court seems to have assumed a different position, and to have treated the prospectus the same as any other method of misrepresentation.

³ 62 N. Y. 319. In *Kountze v. Kennedy*, 147 N. Y. 124 (1895), it was held that the fact that an officer, in a statement of the liabilities of the company, omitted a claim which was afterwards established, was not guilty of such fraud as would sustain a suit at law for damages for deceit.

sons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued, no other relation or privity between the parties need be shown except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff." In England, where a person purchases stock in the open market, being induced to do so by a prospectus and published telegram, both of which are fraudulent, he may hold the promoters personally responsible, although the stock was not purchased from them nor from the corporation.¹

§ 354. *Remedies for the fraud.*—There are three methods by which a person who has been fraudulently induced to buy or sell stock may remedy the wrong.² He may bring an action at law for the consideration, or an action at law for damages for the deceit, or he may file a bill in equity to have the transaction set aside. The second remedy is the most difficult and the last the most easy to maintain. At common law an action to recover back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.³

In special cases other remedies are open to the purchaser.

¹ *Andrews v. Mockford*, 73 L. T. Rep. 726 (1896).

² A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party, whatever may have been received by him by virtue of the contract. He may bring an action in equity to rescind the contract, and in that action have full relief. Such an action is not founded upon a rescission, but is maintained for a rescission, and it is

sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the damages sustained. This action proceeds upon an affirmation of the contract, and the measure of the plaintiff's recovery is the difference between the article sold and what it should be according to the representations." *Vail v. Reynolds*, 118 N. Y. 297 (1890). Where the sale of stock has been induced by fraud, the vendee may follow the money paid by him and recover it back if the identity of the fund can be shown. *Moore v. Williams*, 62 Hun, 55 (1891).

³ *Gassett v. Glazier*, 165 Mass. 473 (1896).

He may compel the defrauding party to abide by the statements that were made.¹ If the contract is executory it may be canceled by mutual agreement.² The pleadings in enforcing the remedies which the vendee has, vary, of course, according to the remedy which is pursued.³

§ 355. *Action for deceit*.—In order to sustain an action for damages for deceit, whereby plaintiff was induced to buy or sell shares of stock, it is necessary for the plaintiff to prove that statements were made or acts done which were fraudulent, that the person guilty of them knew that they were fraudulent, and that the plaintiff acted on such statements or acts in buying or

¹ Where a person organizes a railroad corporation and takes a contract for its construction, and causes all the stock and a large quantity of bonds to be issued to himself, and then sells these stocks and bonds and has knowledge of representations made by corporate officers to his vendee that the company owes nothing except the bonds, he cannot afterwards enforce a claim for doing extra work under a contract, where such contract did not appear on the books of the company. The transaction is a fraud on his part. *Chicago, etc. R'y v. Miller*, 91 Mich. 166 (1892). Although a purchaser of stock cannot rescind, he having been guilty of delay, yet he may sue the vendor upon a warranty that the stock will be worth more than what it was sold for. *Maxted v. Fowler*, 94 Mich. 106 (1892). Stockholders cannot defeat a vendor's lien on the ground that the vendor, before they bought their stock, represented that he had no lien, where they do not set up that defense in a suit by him to establish his lien. *Wilson v. Seymour*, 76 Fed. Rep. 678 (1896).

² A subscription may be canceled by and with the consent of the directors when fraud is involved. Four years afterwards corporate creditors cannot attack it. *McDermott v. Har-*

rison, 9 N. Y. Supp. 184 (1890). See ch. X, *supra*. If there has been a mutual mistake in regard to what the stock really represented in property, an action for money had and received or a suit to cancel the sale will lie. *Norton v. Bohart*, 105 Mo. 615 (1891).

³ In the case of *Smith v. Tracy*, 36 N. Y. 79 (1867), the vendee sued the vendor for a breach of warranty, alleging that the vendor's agent made certain representations as to the condition of the corporation. The action failed on the ground that the vendor did not authorize the agent to make a warranty. In *Ayres v. French*, 41 Conn. 142 (1874), the court held that fraud, inducing the owner of stock to part with it, may be remedied by the action of trover, with a count in case for a fraudulent procurement and conversion of the stock. In *National Exch. Co. v. Drew*, 2 Macq. (H. L.) 103 (1855), it was held that where a person is induced by the fraudulent reports and representations of corporate officers to purchase stock, and the corporation loans him money to do so, it cannot recover back the money loaned. See *Lightfoot v. Creed*, 8 Taunt. 268 (1818), holding that the vendee should declare, not for money paid, but specially on the contract.

selling the stock.¹ In England a statement made recklessly, or without regard as to whether it is true or untrue, may constitute a fraudulent intent.² In New York the rule is more strin-

¹ Quoted and approved in *Trimble v. Reid*, 97 Ky. 713 (1895), where a vendee sued the president for publishing a false statement as to the condition of a bank. An allegation that the plaintiff was induced by the false and fraudulent misrepresentations of the defendant to buy from the latter certain stock which was valueless, and that the defendant knew that the statements were untrue, and that the plaintiff relied on the statements and bought the stock, constitutes a cause of action in tort. *Freeman v. Trickett*, 49 Pac. Rep. 672 (Kan., 1897). A person who makes false statements in regard to a corporation, and then advises the party to whom the statements are made to buy the stock, is liable in an action for deceit to such party. *Heintz v. Mueller*, 49 N. E. Rep. 293 (Ind., 1898); *Arkwright v. Newbold*, L. R. 17 Ch. D. 301 (1881); *Arthur v. Griswold*, 55 N. Y. 400, 410 (1874), the court saying: "The rules of law require a reasonable degree of certainty as to each requisite necessary to constitute the cause of action, viz., representations, falsity, scienter, deception, and injury."

² In the important case of *Derry v. Peek*, L. R. 14 App. Cas. 337 (1889), the House of Lords decided that in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man make a false statement honestly believing it to be true, it is not sufficient, to support an action of deceit, to show that he had no reasonable grounds for his belief. The directors of a tramway company issued a pro-

spectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. The special act incorporating the company conferred this authority, subject to the consent of the board of trade, but at the time of making the statement they had not in fact obtained consent to use steam power, although they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. In an action for deceit by a misrepresentation in a prospectus as to the net profit on the capital employed, the action being against one who was a promoter and also one of the vendors, and whose name appeared in the prospectus and who became a director, the plaintiff must prove (1) that the defendant's statement was untrue; (2) that it was dishonest; (3) that he believed it to be untrue. See also *Glasier v. Rolls*, L. R. 42 Ch. D. 436 (1889), following the House of Lords in *Derry v. Peek*, L. R. 14 App. Cas. 337. In *Peek v. Gurney*, L. R. 6 H. L. 377, 391 (1873), the court said: "It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood." See also ch. IX, § 147, *supra*. In *Bellairs v. Tucker*, L. R. 13 Q. B. D. 562, 579 (1884), however, the court said: "The action is one for deceit. It is necessary . . . not only to prove that the statements in a prospectus or any other document are not true, but it must be proved that they are fraudulently put forward with intent to deceive."

gent. The case of *Wakeman v. Dalley*¹ applies to this class of cases the rule that “an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that he believed, or had reason to believe, at the time he made them, that the representations made by him were false, and that they were for that reason fraudulently made, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge.” This case held that a director is not liable for false representations on the company’s printed business cards, of which he was ignorant, even though his name was attached thereto. In New York a vendee of stock and bonds who sues at law to recover damages for fraud and deceit inducing the purchase of the stock, the fraud and deceit consisting of a misstatement by an officer of the liabilities of the company, must prove that the officer did not believe the statement to be a true exhibit of the company’s affairs, and was guilty of dishonesty. It is insufficient to prove that the statement was grossly inaccurate, and largely understated the actual liabilities of the company. Actual fraud must be proved. It must be shown that the representation was not only false and material, but was

¹51 N. Y. 27, 35 (1872); *Nelson v. Luling*, 36 N. Y. Super. Ct. 544 (1873); *aff’d*, 62 N. Y. 645; *Schwenck v. Naylor*, 102 N. Y. 683 (1886). The case of *Holmes v. Moffat*, 120 N. Y. 159 (1890), was an action for false representations and deceit in the sale of stock, but the decision turned upon technical rules relative to the trial. See also *Clark v. Edgar*, 84 Mo. 106 (1884); *Gee v. Moss*, 68 Iowa, 318 (1886). The action for deceit does not lie against the corporation, at least where no fraudulent intent is proved. *Pinedo v. Germania, etc. Co.*, N. Y. D. Reg., July 29, 1885 (Supreme Ct.). See also § 157, *supra*. In an action of tort for deceit against a director for inducing a person to purchase stock, “the plaintiff must prove representations of material facts which are false, and which induce him to act; and either that the defendant knew them to be

false, or that, the facts being facts susceptible of knowledge, he represented as of his own knowledge that they were true, when in fact he had no such knowledge.” *Cole v. Cassidy*, 138 Mass. 437 (1885). In an action for fraud inducing the purchase of stock scienter must be proved. It is sufficient that the defendant had no good reason to believe that material representations made by him were true. A statement that \$1,500,000 worth of ore was lying on the ground around the mine is a material representation. *Barndt v. Frederick*, 78 Wis. 1 (1890). In Wisconsin, in a suit by a vendee of stock against the vendor for damages for obtaining money and property by false and fraudulent representations, the defendant may be arrested. *Warner v. Bates*, 75 Wis. 278 (1889), giving the complaint and affidavit.

known by the defendant when he made it to be false, or, not knowing whether it was true or false, and not caring what the fact might be, that the defendant made it recklessly, paying no heed to the injury which might ensue. "Misjudgment however gross, or want of caution however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit."¹ Where a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages.² The vendee of stock may sue for damages for deceit where the vendor fraudulently represented the dividends that had been paid on the stock.³ Where a person owns a majority of the stock of a corporation, and sells it, and agrees with the purchaser to obtain the stock held by others at as low a figure as possible, and misstates to such persons the price which he obtained for his own stock, he is liable in an action for deceit to parties who sell their stock relying on such statements.⁴

The purchaser of stock who has given a note in payment cannot defeat an action on the note by setting up that the purchase was induced by fraud. He must first disaffirm the contract and return the certificate, and such return must be made before the trial.⁵ But where the purchaser brings an action for deceit he need not return the consideration nor rescind the contract.⁶ His injury is to be duly measured, and credit may be given for the real value of the stock.⁷ A director is not liable for the misrepresentations and frauds of his co-directors, unless he has

¹ *Kountze v. Kennedy*, 147 N. Y. 124 (1895). Directors of a bank are not liable in an action for deceit to a purchaser of stock, although they signed the cashier's annual statement which was false, there being proof that they believed it to be true. *Foster v. Gibson*, 38 S. W. Rep. 144 (Ky., 1896).

² *Rothmiller v. Stein*, 143 N. Y. 581 (1894).

³ *Handy v. Waldron*, 18 R. I. 567 (1894).

⁴ *Weaver v. Cone*, 174 Pa. St. 104 (1896).

⁵ *Gifford v. Carvill*, 29 Cal. 589 (1866). A transferee claiming to be de-

frauded is nevertheless liable on the statutory liability where he brought a suit for damages for the fraud and recovered judgment. Such a suit is a ratification of the transfer. *Stuart v. Hayden*, 72 Fed. Rep. 402 (1895).

⁶ *Miller v. Barber*, 66 N. Y. 558, 564 (1876); *Newbery v. Garland*, 31 Barb. 121 (1860). See 28 N. Y. App. Div. 1.

⁷ See § 586, *infra*. In an action for false representations inducing the purchase of stock, the defendant may show that the stock was worth as much as it would have been had the representations been true. *Doran v. Eaton*, 40 Minn. 35 (1889).

expressly authorized or tacitly permitted commission thereof.¹ The mere fact of being a director "is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged."² Where, however, proof is given tending to show that the defendants were jointly engaged in a common scheme to defraud the plaintiff, the acts and declarations of one are admissible in proof against all;³ and frauds of a similar nature, at or near the same time as the one complained of, may be shown.⁴ The fraud practiced need not have been the sole inducement to the purchase.⁵ A party may be liable herein although he was neither a corporate officer nor the vendor of the stock. If, with intent to cheat and defraud the vendee, he induces him, by fraudulent means, to purchase for value stock which he knows to be worthless, he is liable for the damage sustained, although the purchase is actually made from another.⁶ A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased.⁷ In

¹ *Weir v. Barnett*, L. R. 3 Exch. D. 32 (1877).

² *Arthur v. Griswold*, 55 N. Y. 400, 406 (1874); *Morgan v. Skiddy*, 62 N. Y. 319 (1875). Where a party purchases stock, relying on a prospectus which states that reports had been "prepared for the directors" by the engineers, and giving extracts therefrom, the directors are not personally liable in an action for deceit, even if it is shown that the reports were prepared on instructions not from the directors, but from the vendors of the property to the company. It is necessary to prove that the reports were untrue. *Angus v. Clifford*, [1891] 2 Ch. 449.

³ *Miller v. Barber*, 66 N. Y. 558, 567 (1876).

⁴ *Miller v. Barber*, 66 N. Y. 558, 568 (1876).

⁵ *Morgan v. Skiddy*, 62 N. Y. 319, 328 (1875); *Ex parte Carling*, 56 L. T. Rep. 115 (1887). Plaintiff need not prove

that he relied solely upon the misrepresentations. *Hatch v. Spooner*, 13 N. Y. Supp. 642 (1891).

⁶ *Hubbell v. Meigs*, 50 N. Y. 480, 490 (1872). Concerning the effect of false and fraudulent representations on an action for damages, see *Tockerson v. Chapin*, 52 N. Y. Super. Ct. 16 (1885). It is no defense to such an action that the original conversion was by some one else. *Kuhn v. McAllister*, 1 Utah, 273 (1875); *S. C. sub nom. McAllister v. Kuhn*, 96 U. S. 87 (1877).

⁷ *Kenedy v. Benson*, 54 Fed. Rep. 836 (1893). Where fraudulent representations are made inducing a party to sell his stock, and then the purchaser wrecks the corporation, the vendor may hold the latter liable for damages. The assignee of the cause of action may sue in trover for conversion, but cannot sue for damages for fraudulent representations, inasmuch as the latter cause of action is

an action by a purchaser of stock against the company and two directors for deceit, the verdict may be against one or more of the defendants, and may be sustained by one or more of the misrepresentations alleged.¹ Several persons defrauded of their contract whereby they were to receive stock cannot sue jointly. Each must sue separately.² The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."³

§ 356. *Remedy in equity.*—A court of equity has concurrent jurisdiction with a court of law in enabling a purchaser of stock to recover back money paid, where the purchase was induced by fraud chargeable to the vendor.⁴ The remedy in

not assignable. *Smith v. Thompson*, 94 Mich. 381 (1892).

¹ *Lare v. Westmoreland Specialty Co.*, 155 Pa. St. 33 (1893), holding also that the party purchasing the stock may rescind or may retain the stock and sue for damages.

² *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep. 249 (1890).

³ *Redding v. Godwin*, 44 Minn. 355 (1890). See also § 586, *infra*. In an action for damages for fraud inducing the plaintiff to purchase stock, the measure of damages is "not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase." The defendant "was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized specu-

lation." *Smith v. Bolles*, 132 U. S. 125 (1889). The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. *Rockefeller v. Merritt*, 76 Fed. Rep. 909 (1896). As to the measure of damages in an action against a broker for fraud inducing the plaintiff to invest in "Grant and Ward" securities, see *James v. Work*, 70 Hun, 296 (1893). In *Smith v. Duffy*, 57 N. J. L. 679 (1895), the measure of damages for fraud in the sale of stock was held to be the actual loss suffered by the vendee, irrespective of the market price of the stock. The vendee may bring an action for damages for deceit even where he has paid part of the price and given security for the balance. He may recover damages to the extent only that the representations were false. *Weaver v. Shriver*, 79 Md. 530 (1894).

⁴ See § 155, *supra*. Where a person is induced to subscribe for stock on the fraudulent representations of the president that the company is in a prosperous condition, the person may file a bill in equity to recover back

equity, for a sale or purchase of stock induced by fraud, is by a bill to set aside the whole transaction. This remedy follows the rules usually prescribed in such suits. It is not necessary for the complainant to prove a fraudulent intent. Innocent

the money, and equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation, and concealment. Both the company and the president individually were made defendants and held liable. *Tyler v. Savage*, 143 U. S. 79 (1892). See also *Hill v. Lane*, L. R. 11 Eq. 215 (1870), where the court said: "It is so well settled that this court will entertain jurisdiction in such cases that it would be a misfortune indeed to the public if there were any sufficient ground for considering that the jurisdiction is doubtful. . . . Although courts of common law may have jurisdiction in some such cases, there is clearly concurrent jurisdiction in this court," doubting *Ogilvie v. Currie*, 37 L. J. (Ch.) 541 (1868); *Campbell v. Fleming*, 1 Ad. & El. 40 (1834). A bill in equity is a proper remedy for fraud inducing a sale of stock. *Andriessen's Appeal*, 123 Pa. St. 303 (1889).

Where the president sells stock for \$120 per share after he has indorsed a false statement of the company's affairs, the stock being really worth but \$70 per share, the vendee may have the sale rescinded. *Prewitt v. Trimble*, 92 Ky. 176 (1891). In a suit to rescind for fraud the plaintiff must prove that the stock was not worth what he paid for it or could not be sold for that sum. *Aron v. De Castro*, 13 N. Y. Supp. 372 (1891); affirmed, 131 N. Y. 648. In an action in equity to rescind a sale of stock for fraud the corporation is not a necessary party. The value of the stock need not be shown, and the amount paid with interest may be recovered. But six years' delay after discovering the fraud is a bar. *Higgins v. Crouse*, 63

Hun, 134 (1892). In an action to rescind for fraud the defrauded subscribers need not join as plaintiffs, although they all purchased at the same time and on the same terms. *Moore v. Robertson*, 11 N. Y. Supp. 798 (1890). Where the vendors represent that the money will be used to buy a secret process, and the purchasers pay over the money to the company for that purpose, and it is mingled with other funds and is not used to purchase the process because the process is a fraud, the vendees may rescind as to the vendors, but cannot make the receiver of the company pay over the money. *Moore v. Robertson*, 11 N. Y. Supp. 798 (1890). The vendor may tender back the stock and file a bill in equity to cancel the sale on the ground that he was induced to purchase by false statements that the corporation owned the secret process; that a patent had been applied for; that it was ready to commence business, and that complainant would be made president and manager. *Benton v. Ward*, 47 Fed. Rep. 253 (1891). To same effect, *Stainbank v. Fernley*, 9 Sim. 556 (1839), where a sale by a director who has issued false reports and declared illegal dividends was set aside. The corporation is a proper party to such actions, if a registry has been obtained by the person who has obtained the stock by fraud, since a retransfer on the corporate books is asked for. See also *Bradley v. Luce*, 99 Ill. 234 (1881). A judgment creditor of a foreign corporation cannot enjoin it from transferring stock and bonds owned by it. The remedy sought must be something in addition to the injunction.

acts or misrepresentations suffice for this purpose, although they would be insufficient to sustain an action for deceit. A vendee may often have relief in equity by reason of misrepresentation based upon mistake or innocent misstatements, where

Rogers v. Michigan, etc. R. R., 28 Barb. 539 (1858). An equitable suit does not lie to rescind a sale of worthless bonds. A suit at law is the proper remedy. *U. S. Bank v. Lyon County*, 48 Fed. Rep. 632 (1892). A purchaser of stock who was induced to purchase by fraud cannot maintain a suit in equity when, he fails to show more than a right to pecuniary damages for misrepresentations. *Whitney v. Fairbanks*, 54 Fed. Rep. 985 (1893). A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations and also claim that the company was not duly incorporated; and further bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets,—all in one bill brought to collect the debt. *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). See to the effect that a court of equity has jurisdiction, *City, etc. Corp. v. Central Trust Co.* (N. Y. L. J., June 12, 1891). Where bank stock is sold by fraudulent and false representations, the bank being aware thereof and receiving indirectly the money paid for the stock, the sale may be rescinded and the money recovered back from it, even though it is insolvent. *Florida, etc. Co. v. Merrill*, 52 Fed. Rep. 77 (1892). Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others similarly deceived to set aside their subscriptions. *Bosher v. Richmond, etc. Co.*, 89 Va. 455 (1892). A bill in equity lies to

rescind a fraudulent sale of stock. *Merrill v. Florida, etc. Co.*, 60 Fed. Rep. 17 (1893). A stockholder in a national bank who transfers his stock in order to avoid the statutory liability may be held liable, and this liability may be enforced by the receiver of the bank. In such a suit a transferee cannot be held liable also, nor can the transferee's claim that he was defrauded be tried in that suit. *Stuart v. Hayden*, 72 Fed. Rep. 402 (1895). If the suit is in equity and the money went to the corporation, an officer cannot be held personally liable, inasmuch as rescission is the essence of the suit. *Zimmele v. American, etc. Co.*, 1 N. Y. App. Div. 327 (1896). A promoter who has taken a contract to purchase a property at a certain price, based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out. *Loewer v. Harris*, 57 Fed. Rep. 368 (1893). Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account and need not resort to an action at law. *Benedict v. Moore*, 76 Fed. Rep. 472 (1896). See also § 321, *supra*. The vendee may rescind where false and material representations were made and the plaintiff relied upon them and was injured, even though he might have made investigations which would have shown

the common-law action of deceit would require much more stringent proof.¹ A purchaser of "watered" stock has various remedies if he has actually been defrauded.² The remedy against promoters who have absorbed the corporate property is by a suit in behalf of the corporation itself.³

Where the fraud is chargeable to the corporate officers or third persons, and the vendor of the stock is innocent, the vendee cannot rescind the sale, unless such corporate officers or third persons acted as agents for the vendor.⁴

Equity will sometimes compel the vendor to make good his representations. Thus, where the vendor represented that the corporate property was unincumbered, equity will, at the in-

their falsity. *Olcott v. Bolton*, 70 N. W. Rep. 366 (Neb., 1897). Several purchasers of stock may contribute to the bringing of a test case to decide whether representations inducing the purchase were fraudulent. *Davies v. Stowell*, 78 Wis. 334 (1890).

Where negotiable bonds are stolen from the owners and they pass into *bona fide* hands, and then the thief obtains them by fraud from such *bona fide* hands and returns them to the first owners, the latter are entitled to keep them. *London, etc. Co. v. London, etc. Bank*, L. R. 21 Q. B. D. 535 (1888). In England this remedy by bill in equity is held to be "precisely analogous to the common-law action for deceit," in that damages may be awarded. *Peek v. Gurney*, L. R. 6 H. L. 377, 390 (1873), the court saying also: "There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity."

¹ *Kountze v. Kennedy*, 147 N. Y. 124 (1895); *Arkwright v. Newbold*, L. R. 17 Ch. D. 301 (1881). A suit in equity lies to rescind a sale of stock induced by fraudulent representations. Intent to defraud need not be proved. *Martin v. Hill*, 41 Minn. 337 (1889);

Freer v. Denton, 61 N. Y. 492 (1875). Actual intent to defraud need not be shown in a suit in equity to rescind. In such a suit similar frauds practiced on others cannot be shown in evidence. *Johnson v. Gulick*, 46 Neb. 817 (1896). Cf. § 165, note.

² See ch. III, *supra*.

³ See ch. XXXIX to XLV, inclusive, *infra*. Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up, and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. *Du Puy v. Transportation, etc. Co.*, 82 Md. 408 (1896).

⁴ *Moffat v. Winslow*, 7 Paige, 124 (1838). Benjamin on Sales (Bennett's ed., 1888), § 467a, says "the only remedy of a shareholder in a joint-stock company, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum*."

stance of the purchaser of stock, enjoin the vendor from enforcing a lien which he has on such property.¹

Although the buyer of stock purchased it at a small nominal price by reason of fraudulent misrepresentations, yet the seller cannot maintain a bill in equity to rescind, where the stock has no special value other than its money value, and the latter can readily be shown.² The fraud may be waived by the acts of the vendee.³ The right to rescind the contract for fraud is waived by taking a bond of indemnity against liability on the stock, such bond being taken upon discovery of the fraud.⁴ A party cannot rescind a purchase of stock on the ground of false representations as to the company's having a secret process, where he learned about the process before completing his purchase, and had held the stock a year, and endeavored to sell the process.⁵ A person cannot rescind for fraud a purchase of stock from the corporation itself, where, subsequently to discovering the fraud, he attended a stockholders' meeting, and voted to assess the stock, and afterward attended another stockholders' meeting and paid the assessment.⁶

¹ *Jones v. Bolles*, 9 Wall. 364 (1869). See also §§ 354 and 771. Where a person organizes a railroad corporation and takes a contract for its construction, and causes all the stock and a large quantity of bonds to be issued to himself, and then sells these stocks and bonds and has knowledge of representations made by corporate officers to his vendee that the company owes nothing except the bonds, he cannot afterwards enforce a claim for doing extra work under a contract, where such contract did not appear on the books of the company. The transaction is a fraud on his part. *Chicago, etc. R'y v. Miller*, 91 Mich. 166 (1892). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may re-

cover the difference, even though the debts of another class were less than a sum specified in the contract of sale. *Chicago, etc. R'y v. Hoyt*, 89 Wis. 314 (1895). See 74 N.W. Rep. 685.

² *Edelman v. Latshaw*, 159 Pa. St. 644 (1894), holding also that the bill will not lie where the defendant purchaser has already sold the stock to a *bona fide* purchaser. An action for deceit was afterwards sustained. See 180 Pa. St. 419 (1897).

³ *Kingman v. Stoddard*, 85 Fed. Rep. 740 (1898).

⁴ *Bridge v. Penniman*, 51 N. Y. Super. Ct. 183 (1885).

⁵ *Benton v. Ward*, 59 Fed. Rep. 411 (1894).

⁶ *Marten v. Paul, etc. Co.*, 99 Cal. 355 (1893). Acting as a shareholder is a waiver of the right to rescind for promoter's misrepresentations. *Petrie v. Guelph, etc. Co.*, 11 S. C. Rep. (Can.) 450 (1885). Where a corporation issues stock and thereafter permits a transfer of the stock and sale

Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock and gives a proxy thereon and attends meetings, he waives his right to rescind.¹

Laches is a bar. And yet where a person buys stock in 1865 on the faith of false representations, and discovers in 1871 that the stock is worthless, and is told by one of the conspirators in 1889 that the representations were false, he may file a bill in equity for rescission of the sale and for recovery of the money paid.² Ordinarily, however, delay is fatal.³

thereof to another person, it cannot get the stock back on the ground of fraud on the part of the party to whom it first issued the stock. *Tecumseh, etc. Bank v. Russell*, 69 N. W. Rep. 763 (Neb., 1897). Delay in rescinding, in hopes that the stock will be more valuable, is fatal. *Weisiger v. Richmond Ice Mach. Co.*, 90 Va. 795 (1894). Where the vendee of stock becomes a director and has access to the books, and complains of fraud in the sale, and then takes a sum of money from the vendor in settlement, he cannot again complain upon the failure of the company. *Powell v. Adams*, 98 Mo. 598 (1889). A vendee who, after the purchase, becomes a director and signs statements similar to the representations made to him, and waits two years before repudiating the stock, cannot repudiate. *Anderson v. Black*, 32 S. W. Rep. 468 (Ky., 1895). A person may defeat notes given for stock which he was induced fraudulently to purchase from the corporation, even though he became and remained cashier for the corporation for over a year after the sale and before he set up the defense, and was a director and voted the stock. He did not necessarily learn the facts from occupying these positions, nor from the fact that he made official

reports of the condition of the company. He was not bound to investigate. He tendered the stock back as soon as he discovered the facts. Especially do these rules apply where no creditors' or other stockholders' rights have intervened. *Nat. Bank v. Taylor*, 5 S. D. 99 (1894).

¹ *Jessop v. Ivory*, 158 Pa. St. 71 (1893). A payment after repudiating the subscription for fraud is not a waiver if made expressly to save money already paid. *Fear v. Bartlett*, 81 Md. 435 (1895).

² *Higgins v. Crouse*, 147 N. Y. 411 (1895), rev'g 71 Hun, 615.

³ A year's delay by the vendor of stock after being advised by his attorney that he had a good case of fraud is fatal. *Perry v. Pearson*, 135 Ill. 218 (1890). Delay of six years after knowledge of fraud inducing a purchase of stock is fatal. *Andriesen's Appeal*, 123 Pa. St. 303 (1889). Three years' delay in tendering back the bonds is not fatal, nor is the fact that the vendee resold the bonds on the same terms, and the sub-vendee returned them to the first vendee. *Wooster v. Sage*, 67 N. Y. 67 (1876), aff'g 6 Hun, 285. The question of laches may be submitted to a jury. *Mayo v. Knowlton*, 134 N. Y. 250 (1892). See also §§ 160-162, *supra*. Silence, delay, vacillation, acquies-

A bill in equity to rescind a fraudulent sale of stock by a corporation lies, even against the receiver of the corporation.¹ In order to rescind a fraudulent sale of stock, the stock and also all other property received must be tendered back.² The vendee

cence, or the retention and use of any of the fruits of a fraudulent sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, are fatal to the right to rescind the same. *Stuart v. Hayden*, 72 Fed. Rep. 402 (1895). Where, six months after the fraud, the purchaser has every opportunity to investigate the truth of the statements and fails to do so, he cannot, after seventeen years' delay, complain, even though he alleges concealment, no dividends having been paid in the meantime. *McEacheran v. Western Transp. etc. Co.*, 97 Mich. 479 (1893). Eleven months after an insolvent bank issues new stock, concealing the facts, a subscriber or purchaser cannot repudiate for fraud, a receiver having gone in, even though the subscriber had just ascertained the facts. *Dunn v. State Bank*, 59 Minn. 221 (1894). Two years' delay in disaffirming is fatal. *Zimmele v. American, etc. Co.*, 1 N. Y. App. Div. 327 (1896). Even after the appointment of a receiver of a bank, a person who was induced to buy stock of the bank by fraudulent statements that the stock was worth par can rescind by suit. *Robinson v. Dicker*, 36 S. W. Rep. 499 (Tex., 1896). A delay of three years after discovery of the false statements, and one year after full knowledge of all the facts, is fatal. *Byrd v. Rautman*, 36 Atl. Rep. 1099 (Md., 1897).

¹ *Merrill v. Florida, etc. Co.*, 60 Fed. Rep. 17 (1893). Even after the corporation has passed into the hands of a receiver, a subscriber for stock may rescind and sue for money paid, fraudulent representations having been made as to the condition of the

company, the subscription being for increased stock, and the increase not having been made until some time after the subscription. *Newbegin v. Newton Nat. Bank*, 66 Fed. Rep. 701 (1895); *aff'd*, *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135 (1896). A stockholder in a national bank who was induced to become such by fraud may have his name taken from the list of stockholders except as against creditors of the bank who became such after he became a stockholder and without notice of the fraud. *Stufflebeam v. De Lashmutt*, 83 Fed. Rep. 449 (1897). See § 164, *supra*, and 86 Fed. Rep. 553.

² *Wainwright v. Weske*, 82 Cal. 193 (1889); *Francis v. New York, etc. R. R.*, 108 N. Y. 93 (1888); 17 Abb. N. Cas. 1, holding also that where the vendee has transferred said stock to another his action fails. The defrauded vendee must tender back the stock unconditionally. If he has used the stock in another transaction, even with the vendor, his right to rescind for fraudulent representations is barred. *Bridge v. Penniman*, 105 N. Y. 642 (1887). But where the vendee has sold part of the stock he cannot maintain a suit in equity to collect money damages for loss occasioned by misrepresentations inducing him to purchase. His remedy is at law. No cancellation of the contract is involved. *White v. Boyce*, 21 Fed. Rep. 228 (1884). Selling some of the stock before repudiating for fraud is no bar to repudiation. 1 R'y & Corp. L. J. 434. Rescission is not barred although the vendee has lost the stock by forfeiture, the vendor having knowledge thereof. *Maturin v. Tredinnick*, 4 New Rep. 15 (1864). If the party sell-

must allege that he was damaged by the misrepresentations and was ignorant of the falsity of the same when made, and if he wishes to rescind must offer to return the stock, or must allege that it is worthless, especially where he is sued upon a note given in payment.¹ If the person fraudulently obtaining stock

ing the stock states that he is selling stock owned by the corporation, when as a matter of fact he is selling his own stock, the vendee, upon discovering the fraud, may rescind the sale, and recover back the purchase price paid. He need not tender the same stock which he received, inasmuch as stock has no "ear-mark." If he has exchanged the stock for the stock of another company into which his company has been merged, he may borrow stock of the first company and make a tender of that. He must, however, rescind promptly upon the discovery of the fraud. Although he does not discover the fraud for four years he may then rescind. *Mayo v. Knowlton*, 134 N. Y. 250 (1892). A suit to cancel a sale of stocks and bonds, on the ground of fraud on the part of the purchaser, will not lie where the money paid at the sale has not been returned or tendered, even though the seller spent the money before he discovered the alleged fraud, and is unable to obtain the amount of money necessary for a tender. Such is the rule even though the amount to be distributed will be due to the plaintiff in case he succeeds in the suit. *Rigdon v. Walcott*, 141 Ill. 649 (1892). A stockholder who has been induced to purchase stock by fraudulent representations, the stock remaining in the hands of the vendor, may file a bill in equity to rescind. The vendee's offer to surrender all claim on the stock, together with a demand for the return of the money, is sufficient. *Zimmele v. American, etc. Co.*, 21 N. Y. Supp. 846 (1893). Where part of the consideration in the sale of stock is that

the vendor resign an office in the company and the vendee be elected in his place, and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position or does something towards restoring the vendor to his former position. *Gassett v. Glazier*, 165 Mass. 473 (1896). In rescinding for fraud the vendee of stock must return or tender the dividends back to the vendor, but cannot demand repayment of assessments paid after discovery of the fraud. *Marten v. Paul, etc. Co.*, 99 Cal. 355 (1893). Where a party has given a note in purchase of stock in two corporations he cannot rescind unless he tenders back the stock in both. *Rohrbacher v. Kleebauer*, 51 Pac. Rep. 341 (Cal., 1897). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. *Tuttle v. Batchelder, etc. Co.*, 49 N. E. Rep. 640 (Mass., 1898).

¹ *Long v. Johnson*, 15 Ind. App. 498 (1896). Where the vendee has disposed of some of the stock before he discovered the fraud, he need not tender back all the stock, but he must allege that he sold it before he discovered the fraud, and set forth the price and other facts. *Hill v. Harri-man*, 95 Tenn. 300 (1895). A misrepresentation that large dividends and profits are being made by a coal company, whereas in fact they were made by fraud practiced upon a railroad company, is good ground for a rescission of the sale. No tender back of the stock need be made, if the prop-

has transferred it to another party, or is about to transfer it, an injunction may be obtained.¹ The corporation should then be made a party.²

§ 357. *Fraud in selling stock may amount to a conspiracy.*—A combination of persons to fraudulently raise the price of a stock by misrepresentations and fraudulent practices may amount to a criminal conspiracy. In England, in 1858, the directors of a joint-stock bank were found guilty of a conspiracy to defraud, where, knowing the bank to be insolvent, they issued a balance sheet showing a profit, and declared a dividend, and issued advertisements inviting the public to invest on such representations.³ Under the New York statutes, a person who sells stock on misrepresentations may be guilty of grand larceny.⁴

erty is worthless. If there was a partial failure of consideration, the defendant could reduce the recovery *pro tanto*. A court of equity may set aside the sale on grounds which would not be sufficient at law. The court so held in an action at law for the purchase price, the answer setting up fraud as a defense. *Boggs v. Wann*, 58 Fed. Rep. 681 (1893).

¹ See §§ 361, 362, *infra*.

² Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet if the certificates are not obtained from the party holding them the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois, in whose name the stock stands on the corporate books, the corporation is a necessary party defendant, and the case cannot be removed to the federal courts. *Rogers v. Van Nortwick*, 45 Fed. Rep. 513 (1891). See also § 338, *supra*. Where

stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. *Bean v. American L. & T. Co.*, 122 N. Y. 622 (1890).

³ *Regina v. Brown*, 7 Cox, Cr. Cas. 442 (1858); *Regina v. Esdaile*, 1 F. & F. 213 (1858); *Regina v. Gurney*, 11 Cox, Cr. Cas. 414. See *Hurrell & Hyde on Directors and Officers*, 3d (Eng.) ed., pp. 176-182, citing cases; *Burnes v. Pennell*, 2 H. L. Cas. 497 (1849). There cannot be such an offense against the United States by the directors of a national bank, since the offense is not recognized by statute. *United States v. Britton*, 108 U. S. 199 (1883). It is difficult for a corporate creditor to seek collection by making out a conspiracy. *Brackett v. Griswold*, 13 N. Y. Supp. 192 (1891).

⁴ *People v. Garrahan*, 19 N. Y. App. Div. 347 (1897).

CHAPTER XXI.

SALES OF STOCK—SALES WHILE SUITS ARE PENDING AFFECTING THAT STOCK; FORGERY; LOST AND STOLEN CERTIFICATES OF STOCK; CONFISCATION OF STOCK.

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| <p>A. PURCHASES WITHOUT A CERTIFICATE OF THE STOCK.</p> <p>§ 358. Rights of a purchaser of certificate of stock where the corporation has registered a transfer to another without surrender of certificate.</p> <p>359. Liability of the corporation herein.</p> <p>360. Rights of purchaser of stock without certificates.</p> <p>B. SALES OF STOCK WHILE SUITS ARE PENDING AFFECTING THAT STOCK.</p> <p>361. Legal proceedings as affecting a sale of an outstanding certificate of stock.</p> <p>362. <i>Lis pendens</i> as affecting a purchase of stock.</p> <p style="text-align: center;">C. FORGERY.</p> <p>363. Forgery as affecting a sale of stock.</p> | <p>§ 364. Rights and liability of transferees of forged certificate of stock, there being no intervening registry on corporate books.</p> <p>365, 366. Liability of corporation to real owner of stock for allowing registry of forged transfer.</p> <p>367. Rights of transferees who purchase after a registry has been obtained.</p> <p style="text-align: center;">D. STOLEN OR LOST CERTIFICATE.</p> <p>368, 369. Stolen or lost certificates of stock indorsed in blank.</p> <p>370. Owner of a lost certificate of stock may obtain new certificates.</p> <p style="text-align: center;">E. CONFISCATION OF STOCK.</p> |
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A. PURCHASES WITHOUT A CERTIFICATE OF THE STOCK.

§ 358. *Rights of a purchaser of certificate of stock where the corporation has registered a transfer to another without surrender of certificate.*—It has often happened that an owner of stock, after selling his stock and delivering to the vendee the certificate therefor indorsed in blank, has gone to the corporation before such transfer is registered, and by misrepresentation or other fraudulent means induced the corporation to issue to another purchaser a new certificate of stock without a surrender of the old one. It is the duty of the corporation to refuse to register a transfer unless the old certificate is delivered up. The outstanding certificate is a continuing affirmation by the corporation that no registry of a transfer of the stock represented by that certificate will be allowed until the certificate itself is presented and surrendered. This affirmation is some-

times declared in a by-law,¹ and sometimes it is printed on the face of the certificate itself.² The obligation of the corporation, however, to require a surrender of the old certificate upon obtaining a registry is the same whether there is a by-law or a statement on the certificate, or neither of these. It exists without any express declaration.³ Where stock is transferred without a transfer of the certificate, and the transferor afterwards transfers the certificate to another party, the former is liable to the first transferee.⁴

§ 359. *Liability of the corporation herein.*—It is the duty and right of a corporation to refuse to allow a registry of a transfer of stock unless the outstanding certificate representing the stock is delivered up and canceled. And it is a duty which the corporation is bound to fulfill. If it allows a transfer to be registered without the old certificate being produced and surrendered, it is liable to any person who, without notice, purchases or has purchased the outstanding certificate.⁵ This rule

¹ Bridgeport Bank v. New York, etc. R. R., 30 Conn. 231 (1861); Strange v. Houston, etc. R. R., 53 Tex. 162 (1880); New York, etc. R. R. v. Schuyler, 34 N. Y. 30 (1865).

² Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879).

³ Factors', etc. Ins. Co. v. Marine, etc. Co., 31 La. Ann. 149 (1879). As regards the English rule herein, see 2 R'y & Corp. L. J. 577 and 625.

⁴ Mahaney v. Walsh, 16 N. Y. App. Div. 601 (1897).

⁵ Factors', etc. Ins. Co. v. Marine, etc. Co., 31 La. Ann. 149 (1879), where a pledgee recovered damages against the corporation for issuing new certificates without a surrender of the one which the plaintiff held; Smith v. American Coal Co., 7 Lans. 317 (1873), where an unrecorded transferee recovered damages against a corporation for issuing a certificate to a purchaser at execution sale on an attachment against the transferor. See also § 486 *et seq.*, *infra*; Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879); Bank v. Lanier, 11 Wall. 369

(1870), the court saying: "It is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty," and is liable; New York, etc. R. R. v. Schuyler, 34 N. Y. 30, 81 (1865); Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (1874), the court saying: "It cannot be denied that, if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock, but on general principles appertaining to the law of estoppel;" Moores v. Citizens' Nat. Bank, 111 U. S. 156 (1883), where the court seemed to hold that the person receiving new certificates without

is well established, and is based on the usages and requirements of trade, and on a wise public policy which favors the protection of those who invest their money in certificates of stock, relying upon the corporation to protect the holder of such cer-

requiring a surrender of the old ones is not such a *bona fide* transferee of stock as may hold the corporation liable; *Brisbane v. Delaware, etc. R. R.*, 94 N. Y. 204 (1883), aff'g 25 Hun, 438, and holding that, until the purchaser of the outstanding certificates presents them, the corporation is protected in paying dividends to the transferee without the old certificates. If no certificate has been issued the rule does not apply. *First Nat. Bank v. Gifford*, 47 Iowa, 575 (1877). The unregistered holder of the certificates is protected, since, if he were obliged to notify the corporation at the time he purchases the stock, "the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicile of the corporation." *Smith v. Crescent City, etc. Co.*, 30 La. Ann. 1378 (1878). See also *Bridgeport Bank v. New York, etc. R. R.*, 30 Conn. 231 (1861), the court saying: "The *bona fide* holders of such certificates had a right to rely upon the certificates, under the circumstances, as securing to them the stock which they represented, against all transfers to other parties." *Strange v. Houston, etc. R. R.*, 53 Tex. 162 (1880), to the same effect, on the ground that the non-production of the original certificate "is notice to the company that a superior title may be in a third party." In *Cady v. Potter*, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old

certificate. If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. *Taft v. Presidio, etc. R. R.*, 84 Cal. 131 (1890); *Lee v. Citizens' Nat. Bank*, 2 Cin. Super. Ct. (Ohio), 298 (1872), holding that the holder of the old certificates is entitled to have the illegal registry canceled. In England there seems to be no decision directly in point. A dictum, however, in *Shropshire Union, etc. Co. v. Queen, L. R.* 7 H. L. 496, 509 (1875), does not support the rule which prevails in this country. The court said: Whether a transfer of shares in a company can or cannot be made without the production of the certificates of the shares is "entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates; but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." The case of *Hart v. Frontino, etc. Min. Co.*, L. R. 5 Exch. 111 (1870), holds, however, that where the corporation cancels the stockholdership of one who purchased after registry without a surrender of the old certificates having been obtained, he may hold it liable in damages. As between two unrecorded transfers, one having the certificate, and the other—a subsequent purchaser—not having it, the former

tificates.¹ Thus, the corporation has been held liable where seventeen years have elapsed since a new certificate was obtained, the latter having been obtained on the ground that the outstanding certificate has been lost.² The corporation need not assume any risk, but may refuse to permit a registry on its books of the transfer unless the old certificate is produced and surrendered.³ Where, however, the corporation is compelled

prevails. *Société Générale v. Tramways Union Co.*, L. R. 14 Q. B. D. 424 (1884). See also cases in § 351, *supra*, and § 416, *infra*. In Canada the outstanding certificate of stock need not be surrendered in order to transfer the stock on the corporate books; and hence, where the registered holder makes two transfers to different persons, the company is not liable for allowing transfer to the one who first presents his transfer, even though he has not the old certificate. *Smith v. Walkerville, etc. Co.*, 23 App. Rep. (Can.) 95 (1896).

¹ *Factors', etc. Ins. Co. v. Marine, etc. Co.*, 31 La. Ann. 149 (1879), the court saying: "We think that, by thus making stocks transferable by mere delivery of the certificate, the law has intended to interdict corporations from transferring stocks on their books, except upon surrender of the certificate or upon proof of its loss or destruction. These certificates of stock have become such important factors in trade and credit that the law has intended to surround those who take them with the safeguards it accords to the holders of the other great agencies of commerce—bills, notes, bills of lading, etc."

² *Cleveland, etc. R. R. v. Robbins*, 35 Ohio St. 483 (1880). But the corporation is not liable for dividends paid in the meantime. It was held, further, that a by-law allowing such issue of new certificates in case of loss had no effect as regards the plaintiff, and that the statute of limitations ran against the plaintiff only from the time he

had notice of the new certificate. By statute, in New York, the person claiming to have lost his certificate may be compelled to give a bond of indemnity to the corporation before obtaining new certificates, and a holder of the old certificates may have the benefit of this bond. N. Y. Sess. Laws, 1873, ch. 151. See § 370, *infra*. Such a subrogation was refused in *Greenleaf v. Ludington*, 15 Wis. 558 (1862).

³ The corporation may refuse to issue stock to the heirs of a stockholder unless they surrender the old certificates. *State v. New Orleans, etc. R. R.*, 30 La. Ann. 303 (1878); *New London Nat. Bank v. Lake Shore, etc. R'y*, 21 Ohio St. 221 (1871), where the corporation refused to allow registry by a purchaser at an execution sale, although it was quite plain that the judgment debtor's sale of the certificates had been in fraud of creditors. As between two unregistered transferees, the one with the certificate is entitled to the stock, especially where he purchased first. *Maybin v. Kirby*, 4 Rich. Eq. (S. C.) 105 (1851); *Société Générale v. Walker*, L. R. 11 App. 20 (1885), aff'g L. R. 14 Q. B. D. 424. So, also, as between a *bona fide* purchaser, to whom the certificates are transferred, and a third party, to whom the vendor had given the stock previous to the sale, the vendee with the certificates is protected. *Crawford v. Dox*, 5 Hun, 507 (1875). In *Wilson v. Atlantic, etc. R. R.*, 2 Fed. Rep. 459 (1880), where an assignee in bankruptcy ap-

to make the registry by legal proceedings, as in case of execution sales, it cannot be held liable to the holder of the outstanding certificate.¹ The corporation, when sued by the holder of the old certificate, is required either to replace the stock which has wrongfully been taken from the plaintiff, or it is obliged to compensate him in damages. Where the certificate which is surrendered to the corporation is stolen from the corporation before its cancellation, the purchaser thereof is not protected.²

§ 360. *Rights of purchaser of stock without certificates.*—A purchaser of stock who does not receive the certificates of the stock he has purchased, but who nevertheless obtains a registry on the corporate books, and receives new certificates without a surrender of the old, and who sells the new certificates, is not liable in damages to the holder of the old certificates,³ unless he obtained registry with knowledge that his vendor had already sold the old certificates to another.⁴ The remedy of the latter is against the corporation, or he may sue the corpo-

plied for registry, the bankrupt having fled with the certificates, it was held that the corporation was bound to allow transfer and to issue new certificates upon a bond of indemnity being given. It has been held, however, that a sale of a certificate of stock to a *bona fide* purchaser is to be upheld, even as against a receiver who has been appointed and been given legal ownership of the registered stock. *Dudley v. Gould*, 6 Hun, 97 (1875).

¹ *Friedlander v. Slaughter-house Co.*, 31 La. Ann. 523 (1879). See also ch. XXII, § 388, *infra*. Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. *Bean v.*

American Loan, etc. Co., 122 N. Y. 622 (1890).

² In *Knox v. Eden Musée, etc. Co.*, 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock. A transferee who receives new certificates of stock is not affected by the fact that the old certificates are fraudulently re-issued by a corporate officer. See § 292, *supra*.

³ *Baker v. Wasson*, 53 Tex. 150 (1880).

⁴ *Scripture v. Francetown Soap-stone Co.*, 50 N. H. 571 (1871).

rate officer who allowed the transfer.¹ The purchaser of the stock may insist on the old certificate being produced and surrendered at the time of registration, but if he waives this right, and a registry is made, he cannot afterwards refuse to accept the stock on that account.² The corporation is not liable to the person who is registered as a stockholder without the surrender of the old certificate, at least not where the registry is by the secretary, without special authority from the board of directors.³ Where, however, the purchaser of stock without the certificates obtained registry on the corporate book, the corporation cannot afterwards remove his name in favor of the purchaser of the old certificate. The former may compel the corporation to replace his name.⁴ Where the company by mistake allows a transfer and issues new stock to a party after the vendor has already sold the stock to another party, and after the latter has obtained a transfer, the company is liable to the second purchaser.⁵ A pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's receiver who takes possession of the certificates.⁶

¹ *Baker v. Wasson*, 59 Tex. 140 (1883).

² *Boatmen's Ins. etc. Co. v. Able*, 48 Mo. 136 (1871). A bank cashier may transfer bank stock standing in his name in the stock register, even though he does not turn back the certificates. *Finn v. Brown*, 142 U. S. 56 (1891). In Indiana, where an administrator cannot sell personal property except in a certain way, the corporation is liable to the estate if it allows a transfer of stock on its books under a sale by the administrator, who has not complied with the law. The purchaser, however, who does not see the old certificates, but takes new certificates issued by the corporation, is protected. *Citizens' St. R'y v. Robbins*, 128 Ind. 449 (1891).

³ *Hall v. Rose Hill, etc. Co.*, 70 Ill. 673 (1873); *Houston R'y v. Van Alstyne*, 56 Tex. 439 (1882), holding that the corporation is not bound to recognize as a stockholder one who obtains registry without a surrender of

the old certificates, a regular registry with a surrender of such certificates having previously been obtained by another. Cf. *Hart v. Fronto*, etc. Co., L. R. 5 Exch. 111 (1870).

⁴ *Cady v. Potter*, 55 Barb. 463 (1869). In *Platt v. Birmingham Axle Co.*, 41 Conn. 255 (1874), the corporation was protected by its lien, and the fact that it bought the stock without the certificates was not the essential point of the case. The corporation cannot interplead after it has allowed the transfer. *Cady v. Potter*, 55 Barb. 463 (1869); *Mt. Holly, etc. Co. v. Ferree*, 17 N. J. Eq. 117 (1864). But it may interplead if it has refused to transfer to any one. *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454 (1879). See also § 387, *infra*.

⁵ *Balkis Consol. Co. v. Tomkinson*, [1893] A. C. 396.

⁶ *Atkinson v. Foster*, 134 Ill. 472 (1890).

B. SALES OF STOCK WHILE SUITS ARE PENDING AFFECTING THAT STOCK.

§ 361. *Legal proceedings as affecting sales of outstanding certificates of stock.*—It is a well-established principle of law that shares of stock may, for certain purposes, have a *situs* at two separate places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicile of the stockholder.¹ On the other hand, it has at the same time a *situs* where the corporation exists, and this *situs* may be for the purposes of suits concerning the title to the stock, for attachment and-execution, and for various other similar purposes. Great difficulty arises in many instances of legal proceedings affecting the title to stock by reason of the fact that, where the defendant has in his possession the certificates of stock, and is not enjoined from transferring them, he may transfer them, either before or after suit has been commenced against him to obtain possession of the stock represented by such certificates or to subject it to his debts. The question then arises whether the *bona fide* transferee of such certificate is to be allowed to retain the stock, or whether the successful plaintiff in the suit against the defendant who has transferred the stock may follow such stock and take it from the transferee. This conflict of right between the purchaser of the outstanding certificates and the purchaser whose title is based on judicial proceedings arises most often in cases of attachment or execution issued against shares of stock at the domicile of the corporation. In such cases the better rule seems to be that transferees of the certificate held by the defendant are protected and entitled to protection at the hands of the corporation, if their purchase is made before the attachment or execution is levied; but that transfers made after the levy are not binding so far as the corporation and the plaintiffs

¹ It is important here to distinguish shares of stock from the certificates for those shares. *Certificates* of stock have no *situs* or domicile. They cannot be attached or subjected to execution. The stock itself is not the same as the certificate representing it. *Winslow v. Fletcher*, 53 Conn. 390 (1886). Though prevented by injunc-

tion from transferring, the corporation must preserve the rights of a party who notifies it of his rights. *Purchase v. New York Exch. Bank*, 3 Rob. (N. Y.) 164 (1865). As regards the rights and duties of the corporation herein when stock is sold under an execution or is attached, see § 489, *infra*.

to the suit are concerned, provided the suit itself is successful.¹ The same difficulty and conflict of rights arise in suits to reclaim stock which has been taken from the plaintiff by fraud, or by the torts of an agent or pledgee, or by the breach of trust of an executor, administrator, guardian, or trustee.² The plaintiff seeking to recover his stock, certificates for which are in the hands of the defendant, seems to have but two modes of procedure whereby he may prevent the defendant from transferring the certificates. The suit should be brought in the state of the domicile of the corporation and attachment against the stock issued,³ or, when the defendant is sued in another state, an injunction restraining the defendant from transferring the stock should be obtained. It is true that, after judgment has been obtained and the decree of the court executed, any subsequent transfer of the certificates by the defendant is null and may be disregarded by the plaintiff and by the corporation.⁴ But while the suit is pending the defendant may transfer the certificates, and the *bona fide* transferee takes a good title to the stock. The latter is not affected by or bound to take notice of a *lis pendens* in that suit. If no temporary injunction is obtained, a transfer made on the corporate books pending suit is good, and the corporation cannot be made liable, although a party defendant.⁵ Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet, if the certificates are not obtained from the party holding them, the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser.⁶ A claimant of stock in a corporation cannot institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, where the holders of the stock are non-residents and are brought

¹Smith v. American Coal Co., 7 Blatchf. 173 (1872); S. C., 22 Fed. Cas. Lans. 317 (1873); Smith v. Crescent City, etc. Co., 30 La. Ann. 1378 (1878); 960.

and ch. XXVII, *infra*.

²Holbrook v. New Jersey Zinc Co., 57 N. Y. 616 (1874); Leitch v. Wells, 48 N. Y. 585 (1872).

³Quarl v. Abbett, 102 Ind. 233 (1885).

⁴Sprague v. Cocheco Mfg. Co., 10

⁵Hawes v. Gas Consumers' Ben. Co., 12 N. Y. Supp. 924 (1891). See also editorial N. Y. L. J., March 29, 1890. Cf. § 387, *infra*.

⁶Joslyn v. St. Paul Dist. Co., 44 Minn. 183 (1890); Bean v. American Loan, etc. Co., 122 N. Y. 622 (1890).

into the case only by publication and substituted service. The court does not acquire jurisdiction over the defendants.¹ If, however, the certificates of stock are within the jurisdiction, the case is different, and jurisdiction may be obtained over non-resident defendants by publication.²

§ 362. *Lis pendens as affecting a purchase of stock.*—A purchaser of certificates of stock is not chargeable with constructive notice that a suit is pending in which his vendor is defendant, and the plaintiff is endeavoring to obtain possession and title to the stock which the purchaser is buying. The doctrine of *lis pendens* has no application to sales of shares of stock. The purchaser is bound to know that a judgment or decree has been rendered and executed affecting the certificates he is buying, if such a judgment or decree exists; but he is not bound to know that a suit is pending in which judgment has not yet been rendered. That a *lis pendens* in a suit involving shares of stock does not affect a purchaser of the certificate representing those shares, the purchase being made while the suit is pending, was clearly established by the court of appeals of New York in the case of *Holbrook v. New Jersey Zinc Company*.³

C. FORGERY.

§ 363. *Forgery as affecting a sale of stock.*—An owner of shares of stock cannot be deprived of his property by a forgery through which his certificates of stock pass into the hands of innocent purchasers. He may be deprived of his stock, but has in lieu thereof the right to collect the value of that stock, either from the corporation or from parties who have held the stock. The rights and remedies of the stockholder who has lost possession of certificates of stock by forgery vary according to the extent to which his certificate has been transferred. This remedy may be against the transferees of the certificate before

¹ *Jellenik v. Huron, etc. Co.*, 82 Fed. Rep. 778 (1897).

² *Ryan v. Seaboard, etc. R. R.*, 83 Fed. Rep. 889 (1897); *Merritt v. American, etc. Co.*, 79 Fed. Rep. 228 (1897). See also §§ 12, 13, *supra*; § 475, *infra*.

³ 57 N. Y. 616 (1874), following *Leitch v. Wells*, 48 N. Y. 586 (1872). See *Dovey's Appeal*, 97 Pa. St. 153

(1881), where the court refused to pass upon this question; also *Bank of Virginia v. Craig*, 6 Leigh (Va.), 399, 435 (1835), holding that a *lis pendens* in a suit by sureties to restrain guardian from selling stock is not notice to the corporation to refuse to allow him to register a transfer.

a registry has been obtained, or it may be against the corporation for allowing a registry, or it may be against the person obtaining the registry. The forgery itself may consist of any writing on the certificate of stock, whereby, with intent to defraud, it is falsely and materially so made or altered as to have an apparent legality.¹ Generally the forgery is of the name of the stockholder to the transfer on the back of the certificate.² The forgery may, however, be committed by changing the number of shares of stock which the transferrer has written out in the transfer,³ or by inserting the numbers of shares of stock of one corporation in a blank transfer duly signed by the stockholder, but signed for the purpose of transferring shares of stock in another and different corporation.⁴

The subject of forgery by one or more corporate officers, whereby spurious and overissued stock is issued, there being no old certificates returned to the company at that time, is considered elsewhere.⁵

The subject now under consideration is where the name of a stockholder is forged to an assignment of the certificate or the certificate itself is modified.

§ 364. *Rights and liabilities of transferees of forged certificates of stock, there being no intervening registry on corporate books.* The position of a transferee of a certificate of stock which is invalid by reason of forgery depends largely on whether there has been an intervening registry of transfer on the corporate books after the former owner was deprived of his stock by the forgery. The forger himself is of course liable, not only to the

¹ See 1 Bouvier's L. Dict., p. 679; 2 Bish. Cr. L., § 523.

² Nearly all of the cases in the several following sections are cases of a forgery of the stockholder's name to a transfer. It is forgery for one trustee to write in the names of the other trustees without authority. *Cottam v. Eastern Counties R'y*, 1 J. & H. 243 (1860); *Sloman v. Bank of England*, 14 Sim. 475 (1845). Or for one partner to write in the name of the other partner without authority, where the stock stood in their joint names. *Midland R'y v. Taylor*, 8 H.

L. Cas. 751 (1862), aff'g *Taylor v. Midland R'y*, 29 L. J. (Ch.) 731 (1860).

³ *Matthews v. Massachusetts Nat. Bank*, Holmes, 396 (1874); S. C., 16 Fed. Cas. 1113; *Sewall v. Boston Waterpower Co.*, 86 Mass. 277 (1862), where the alteration was treated as a forgery so far as legal rights were concerned, although the alteration was due to an innocent misunderstanding of a clerk.

⁴ *Swan v. North British, etc. Co.*, 7 H. & N. 603 (1862), practically overruling *Ex parte Swan*, 7 C. B. (N. S.) 400 (1859).

⁵ See §§ 291-298, *supra*.

real stockholder, but also to any other person who has been injured by the forgery. If the purchaser of stock from one who has forged a transfer of the same sells the same after being notified by the real owner that the latter claims the stock and has been deprived of it by forgery, the real owner may recover damages in trover for the value of the stock from the person who so sells, although he purchased in good faith and without notice of the forgery.¹ If the forgery is committed by a member of a firm, the real owner may sue the firm for money had and received, and may recover the value of the stock and dividends.² Where the forger has sold the stock to a purchaser without notice, and the latter has sold to another purchaser without notice, and the latter is deprived of his apparent ownership on account of the forgery, the second transferee may hold the first transferee liable.³ This principle grows out of the well-established rule of law that, in a sale of chattels, there is an implied warranty of title, unless the circumstances are such as to give rise to a contrary presumption. A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.⁴ The broker and auctioneer of stock which passes through their hands cannot, it seems, be held liable, though it turns out that on account of a forgery there was no title to the stock in the party whom they represented.⁵ The transferee whose title is based on a forgery has no rights as against the corporation, where there has been no registry on the corporate books after the forgery. He can-

¹ *Monk v. Graham*, 8 Mod. 9 (1721).

² *Marsh v. Keating*, 1 Bing. N. Cas. 198 (1834); *Stone v. Marsh*, 6 B. & C. 551 (1827).

³ *Matthews v. Massachusetts Nat. Bank*, Holmes, 396 (1874); S. C., 16 Fed. Cas. 1113. This was an extremely harsh case, involving a rigid application of the principle, since the defendant's name appeared on the back of the certificate of stock as a transferrer, when in fact it had only been a pledgee, and on payment of the pledge had retransferred the stock. As to the liability of brokers for the forgery of their employee in delivering spurious stock to a customer, see

Andrews v. Clark, 72 Md. 396 (1890).

Compare, however, § 296, *supra*. A purchaser without notice of a forged bond may recover back the price paid by him to the vendor, even though the vendor was himself a *bonu fide* purchaser and without notice of the illegality of the bond. There is an implied warranty of identity of the thing sold. *Meyer v. Richards*, 163 U. S. 385 (1896).

⁴ *Second Nat. Bank v. Curtiss*, 2 N. Y. App. Div. 508 (1896).

⁵ *Machinists' Nat. Bank v. Field*, 126 Mass. 345 (1879). See also *Isham v. Post*, 141 N. Y. 100 (1894), as to the liability of a trustee.

not compel the corporation to allow him to register his transfer. If the corporation has already registered him as transferee, it may repudiate its registry so far as *he* is concerned, and refuse to recognize him as a stockholder or as having the right to transfer the stock.¹ Such a registered transferee has no right of action against the corporation by reason of its rescission of his registry,² although the rule may be different if he purchased by reason of the fact that he was allowed such registry on the corporate books.³ On the other hand, it is the transferee obtaining registry who warrants the validity of his title and right to transfer; and if the corporation is compelled to pay damages to the real owner on account of allowing such registry, it may have recourse to and collect the same damages from the transferee who obtained the registry, however innocent the latter may have been.⁴ The person who first obtains a registry after a forgery has deprived the real owner of his stock cannot retain the new certificates as against the real owner of the old ones.⁵

§ 365. *Liability of corporation to real owner of stock for allowing registry of forged transfer.*—It is the duty of a cor-

¹ *Simm v. Anglo-American Tel. Co.*, L. R. 5 Q. B. D. 188 (1879); *White-wright v. American Tel. etc. Co.*, N. Y. Daily Reg., Aug. 6, 1886 (Superior Ct.); *Waterhouse v. London, etc. R'y*, 41 L. T. Rep. 553 (1879); *Hambleton v. Central Ohio R. R.*, 44 Md. 551 (1876); *Brown v. Howard F. Ins. Co.*, 42 Md. 284 (1875); *Hildyard v. South Sea Co.*, 2 P. Wms. 76 (1722). *Cf.* *Ashby v. Blackwell*, 2 Eden, 299 (1765), holding the corporation liable not only to the real owner, but also to the transferee obtaining registry. See § 367, *infra*, for rights of transferee of the first registered holder.

² See § 367, *infra*.

³ *Metropolitan Sav. Bank v. Baltimore*, 63 Md. 6 (1884). In this case the plaintiff took the forged certificates in pledge from the forger. Afterwards, upon the forger's applying for a further loan on the same pledge of stock, the corporation refused unless the stock was registered

in its name, which was accordingly done. Held, that the bank lost the first loan, but had recourse to the corporation for the second loan.

⁴ *Boston, etc. R. R. v. Richardson*, 185 Mass. 473 (1883), the court saying also, in a dictum, that the defendant has a remedy over against the parties that sold to him.

⁵ *Johnston v. Renton*, L. R. 9 Eq. 181 (1870). In *Scarlett v. Ward*, 52 N. J. Eq. 197, 210 (1893), the court said, in regard to the exception as to one who applies *bona fide* for a transfer of stock that has been forged: "This exception, I take it, is founded on the fact that the person who so obtains registry has had possession of the certificate and forged indorsement, and has thus been put on inquiry as to whether it is genuine, and has used it without such inquiry, and still holds the fruit of the fraud effected by the forgery."

poration to prevent and refuse a registry of transfer of stock where that transfer has been forged. If the corporation fails to detect the forgery it is liable to the real owner of the stock who has been deprived of it by the forgery.¹ The owner of the stock may compel the corporation to cancel the illegal registry and restore the name of the plaintiff.² Inasmuch, how-

¹ *Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110 (1877); *Sewall v. Boston Water-power Co.*, 86 Mass. 277 (1862); *Pratt v. Boston, etc. R. R.*, 126 Mass. 443 (1879); *Johnston v. Renton*, L. R. 9 Eq. 181 (1870); *Cottam v. Eastern Counties R'y*, 1 J. & H. 243 (1860); *Midland R'y v. Taylor*, 8 H. L. Cas. 751 (1862), aff'g *Taylor v. Midland R'y*, 29 L. J. (Ch.) 731 (1860); *Davis v. Bank of England*, 2 Bing. 393 (1824); *Swan v. North British, etc. Co.*, 7 H. & N. 603 (1862), substantially overruling same case in court of law, *Ex parte Swan*, 7 C. B. (N. S.) 400 (1859); *Pollock v. National Bank*, 7 N. Y. 274 (1852); *Day v. American Tel. etc. Co.*, 52 N. Y. Super. Ct. 128 (1835); *Dalton v. Midland R'y*, 12 C. B. 458 (1852); *Baltimore v. Ketchum*, 57 Md. 23 (1881); *Coates v. London, etc. R'y*, 41 L. T. Rep. 553 (1879); *Blaisdell v. Bohr*, 68 Ga. 56 (1881); *Sloman v. Bank of England*, 14 Sim. 475 (1845). For a careful analysis of the English cases to the effect that the corporation is liable to a person who actually pays money or loses money in reliance upon the "certification" or act of the corporation directly with the purchaser of a certificate, even though there has been no intervening transfer, see 6 *Judicial Review* (Eng.), 58. See also *Telegraph Co. v. Davenport*, 97 U. S. 369 (1878), where the courts said: "Upon the facts stated there ought to be no question as to the right of the plaintiffs to have their shares replaced on the books of the company and proper certificates issued to them, and to recover the dividends accrued on the shares after the unauthorized trans-

fer; or to have alternative judgments for the value of the shares and the dividends. Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. . . . Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner." A corporation is liable to the owner of stock if it allows a transfer of the stock to be made to a transferee who forged the owner's name to the transfer on the back of the certificate of stock. *Pennsylvania Co. v. Philadelphia, etc. R. R.*, 153 Pa. St. 160 (1893).

² *Johnston v. Renton*, L. R. 9 Eq. 181 (1870); *Cottam v. Eastern Counties R'y*, 1 J. & H. 243 (1860); *Sloman v. Bank of England*, 14 Sim. 475 (1845). Where a person's stock has been transferred on the corporate

ever, as a *bona fide* transferee of the illegally *registered* transferer is entitled to retain the stock, the former owner of the stock, in suing the corporation, should demand relief in the alternative, that the stock be restored to him, or that he be given damages in lieu thereof.¹ Or he may demand that the corporation replace the stock by going into the market, if necessary, and purchasing similar stock.² If the stockholder sues the corporation for a dividend on stock which by a forged assignment has been registered in the name of another person, the corporation cannot interplead.³ A court of equity has concurrent jurisdiction with law in remedying a forged transfer of stock.⁴ The corporation, the co-conspirators, and the transferees of the forged certificate are all proper parties to the suit;⁵ but the only necessary party is the corporation itself.⁶ Where the corporation is sued by the real owner of the stock for allowing the registry of a transfer based on forgery, it cannot

books on a forged power of attorney, he may file a bill to compel the corporation to cancel the transfer and re-issue the stock to him, or else to pay him the value thereof. The court also held in this case that the fact that the stockholder gave a person access to the safe-deposit box containing such certificates of stock was no defense to the corporation, and also the fact that the stockholder had authorized such person to sign the stockholder's name to other certificates of stock, was no defense to the corporation. *Pennsylvania Co. v. Franklin Ins. Co.*, 37 Atl. Rep. 191 (Pa., 1897). A corporation canceling a certificate of stock and issuing another certificate to the assignee under a forged assignment will be required to re-issue to the original owner a certificate in lieu of the one canceled. The holder of the certificate which was illegally issued is not a necessary party to the suit unless it is shown that the plaintiff is insolvent, or that there will be an overissue by the corporation if the certificate is issued to the plaintiff. *Chicago Edison Co. v. Fay*, 164 Ill. 323 (1896).

¹ This is the usual prayer for relief in this country.

² *Pratt v. Boston, etc. R. R.*, 126 Mass. 443 (1879).

³ *Dalton v. Midland R'y*, 12 C. B. 458 (1852).

⁴ *Blaisdell v. Bohr*, 68 Ga. 56 (1881).

⁵ *Blaisdell v. Bohr*, 68 Ga. 56 (1881). As to a statutory criminal liability of an officer forging and issuing stock, see *State v. Haven*, 59 Vt. 399 (1887).

⁶ *Chicago Edison Co. v. Fay*, 164 Ill. 323 (1896); *Baltimore v. Ketchum*, 57 Md. 23 (1881); *Pratt v. Boston, etc. R. R.*, 126 Mass. 443 (1879). The statute of limitations in behalf of the corporation begins to run against a cause of action for forged transfer only from the time when the corporation denies its liability therefor. *Barton v. North Staffordshire R'y*, L. R. 38 Ch. D. 458 (1888). In a stockholders' action to compel the corporation to retransfer stock to them which has been transferred on the corporate books by forgery, the holders of the new certificates are not allowed to come in and defend. *Barton v. London, etc. R'y*, L. R. 38 Ch. D. 144 (1888).

institute an independent action bringing in all the parties interested and enjoining the action of the owner of the stock.¹ The latter is entitled to his action at law without delay and without involving or settling the respective rights of others. The liability of the corporation on stock which was forged by corporate officers or fraudulently issued by them is considered elsewhere.² Where a trust company, as registrar of stock, allows a transfer on a forged assignment, it is liable to the owner for the value of the stock, less any amount which he may have recovered from other parties.³

§ 366. The right of the rightful owner of the stock to complain of the forgery whereby his certificate has passed into the possession of another may be barred by estoppel or ratification. Formerly it was held that the negligence of the owner of the stock would be a bar to his remedy.⁴ Later decisions, however, have firmly established the rule that "there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer."⁵ Accordingly, the rightful owner of the stock is held not to be barred of his remedy by the fact that the stockholder, a corporation, allowed its corporate seal to be in the possession of its secretary, whereby he sold the stock owned by the corporation,⁶ or by the fact that the owner delayed several months, during which time the forger escaped,⁷ or that he transferred on the back of the certificate only part of the shares specified in the certificate;⁸ or that he gave his address wrong, and thereby a letter of inquiry did not reach him;⁹ or that he allowed his clerk, the forger, to have access to his papers, and

¹ American Tel. etc. Co. v. Day, 52 N. Y. Super. Ct. 128 (1885).

² See § 293, *supra*.

³ Wiechers v. Central Trust Co., 80 Hun, 576 (1894).

⁴ Coles v. Bank of England, 10 Ad. & E. 437 (1839), where the continuous receipt of dividends on a less quantity of stock than she was entitled to was held a bar, though the stockholder was old and infirm.

⁵ Bank of Ireland v. Evans Charities, 5 H. L. Cas. 389 (1855).

⁶ Bank of Ireland v. Evans Charities, 5 H. L. Cas. 389 (1855); and Merchants of the Staple v. Bank of England, 56 L. T. Rep. 665 (1887), where the preceding case was reluctantly followed.

⁷ Davis v. Bank of England, 2 Bing. 393 (1824).

⁸ Sewall v. Boston Water-power Co., 86 Mass. 277 (1862).

⁹ Johnston v. Renton, L. R. 9 Eq. 181 (1870).

gave him blank transfers duly signed to use in transferring other stock;¹ or that the guardian of the plaintiff was negligent.²

§ 367. *Rights of transferees who purchase after a registry has been obtained.*—It has already been shown that the transferees of a certificate of stock which has been put in circulation by forgery are not allowed to retain such stock where there has not been, at some time subsequent to the forgery, a transfer registered on the corporate books. It has also been shown that he who applies to the corporation for a registry of transfer, such registry being the first one since the forgery was committed, is not allowed to retain the stock. An entirely different rule prevails as regards all subsequent *bona fide* holders of the new certificate obtained by the first registry. The person who obtains the first registry has no rights except as against his transferer. But all subsequent purchasers without notice are fully protected. They cannot be compelled to give up the stock, either to the corporation or to the person who lost it by forgery.³ This rule arises, not from the law of negligence, but from the law of estoppel operating against the corporation. It is in accord with the demands of trade and the constant tendency of the law to protect *bona fide* purchasers of certificates of stock.

D. STOLEN OR LOST CERTIFICATES.

§ 368. *Stolen or lost certificates of stock indorsed in blank.*—One of the most important elements of the negotiability of promissory notes is that, if the holder of such note loses it or

¹ *Swan v. North British, etc. Co.*, 7 H. & N. 603 (1862), substantially overruling *Ex parte Swan*, 7 C. B. (N. S.) 400 (1859).

² *Telegraph Co. v. Davenport*, 97 U. S. 369 (1878).

³ *Machinists' Nat. Bank v. Field*, 126 Mass. 345 (1879); *Re Bahia, etc. R'y*, L. R. 3 Q. B. 584 (1868), where, however, the corporation, having canceled all the registries made subsequent to the forgery, was held liable in damages to a purchaser subsequent to the first registry. The court said the giving of a certificate "is a declaration by the company to all

the world that the person in whose name the certificate is made out and to whom it is given is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfers of shares." A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. *Winter v. Montgomery Gaslight Co.*, 89 Ala. 544 (1889). A corporation cannot refuse to transfer stock on

it is stolen from him when it is indorsed in blank, a subsequent *bona fide* purchaser of such note is protected as against the person who lost it. A different rule seems to prevail as regards certificates of stock indorsed in blank and then lost or stolen. In this respect certificates of stock are not negotiable. It has been clearly held that a purchaser from a thief of certificates of stock indorsed in blank is not protected, nor is any subsequent purchaser of that identical *certificate* allowed to claim the stock. The real owner of the certificate may compel the corporation, which has refused to recognize the thief's transferee's title, to register the stock as his, or he may have damages against a *bona fide* transferee of the thief where such transferee has sold the stock.¹ Where certificates of stock indorsed in blank are deposited in a bank, and the cashier fraudulently abstracts and disposes of them, he is guilty of embezzlement at common law, and there can be no *bona fide* purchaser of such stock.² In Nevada it is held that the purchaser and vendor of

the ground that the vendor fraudulently induced the company to issue the stock to him, where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. *American Wire Nail Co. v. Bayless*, 91 Ky. 94 (1891).

¹*Barstow v. Savage Min. Co.*, 64 Cal. 388 (1883), substantially overruling *Winter v. Belmont Min. Co.*, 53 Cal. 428 (1879); *Anderson v. Nicholas*, 28 N. Y. 600 (1864), where the purchaser of the stolen certificate was not a *bona fide* purchaser. The court said that even if he had been a *bona fide* purchaser he would not be protected. Cf. *Aull v. Colket*, 33 Leg. Int. 44 (Pa., 1876), where the question of negligence was submitted to the jury. The mere fact of losing it is no proof of negligence. *Biddle v. Bayard*, 13 Pa. St. 150 (1850). The purchaser of a certificate indorsed in blank and stolen is not protected. *Given's Appeal*, 16 Atl. Rep. 75 (Pa., 1888). The *bona fide* purchaser of a certificate of stock indorsed in blank, but which was stolen from the owner,

is not protected. *East Birmingham Land Co. v. Dennis*, 85 Ala. 565 (1888). A stock broker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership. *Swim v. Wilson*, 90 Cal. 126 (1891). In *Knox v. Eden Musée, etc. Co.*, 148 N. Y. 441, 456 (1896), the court said that there was "no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value." . . . "The title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser."

²*O'Herron v. Gray*, 168 Mass. 573 (1897).

the stolen certificate is liable in damages to its real owner, although the former acted as a broker and without notice.¹ The *bona fide* purchaser of a stolen certificate of stock indorsed in blank cannot compel the corporation to register him as a stockholder.² The person stealing certificates of stock is guilty of larceny, and may be convicted for the same.³ The corporation cannot obtain an injunction against a possible action by the purchaser of stolen certificates who has applied for registry and been refused it.⁴

§ 369. Where, however, certificates of stock indorsed in blank have been stolen, and the thief or his transferee has obtained a registry on the corporate books and obtained new certificates of stock, and these new certificates have been sold, the purchaser is protected in his possession of the stock.⁵ In Michigan

¹ *Bercich v. Marye*, 9 Nev. 312 (1874); *Barstow v. Savage Min. Co.*, 64 Cal. 388 (1883). According to the California decision the same rule would be applied to negotiable instruments. In another case, where a broker innocently sold for a principal a stolen negotiable government bond, the broker was held liable to the true owner. *Kimball v. Billings*, 55 Me. 147 (1867). The court expressly refused, in this case, to place the broker in the same position as an innocent purchaser for value. In *Zulick v. Markham*, 6 Daly, 129 (1875), it was sought to extend this doctrine to the sale of certificates of stock which had only been misapplied. Here defendant, a broker, had innocently sold for a fraudulent principal indorsed certificates of stock, which had not been stolen from the owner, but had been delivered by him to defendant's fraudulent principal, who had sold the certificates to defendant through another innocent broker. The New York court held the broker in this case to stand on the same footing as an innocent purchaser and not liable to the owner for the proceeds; but no opinion was expressed as to the rule of liability if the stock had been stolen instead of misapplied.

² *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412 (1875). Although two persons have a safety-deposit box in common, and one of them steals therefrom a certificate of stock owned by the other and indorsed in blank by the latter, yet a purchaser even in good faith of such stolen certificate is not protected. *Bangor, etc. Co. v. Robinson*, 52 Fed. Rep. 520 (1892). See also *Knox v. Eden Musée, etc. Co.*, 148 N. Y. 441 (1896), where certificates of stock which had been returned to the corporation were stolen before they had been canceled. This case came before the court again in 17 N. Y. App. Div. 365.

³ *People v. Griffin*, 38 How. Pr. 475 (1869). A criminal statute against fraudulently issuing stock does not apply to a transaction where the treasurer obtained a certificate which he as an individual had pledged, and after obtaining it canceled it as treasurer and issued a new certificate to himself in place thereof. *State v. Moore*, 39 Atl. Rep. 584 (N. H., 1897).

⁴ *Buffalo Grape Sugar Co. v. Alberger*, 22 Hun, 349 (1880).

⁵ Approved in *Scarlett v. Ward*, 52 N. J. Eq. 197 (1893); *Mandlebaum v. North Am. Min. Co.*, 4 Mich. 465 (1857). A purchaser of certificates of stock

this is held to be the rule, even though such purchaser took the stock with full knowledge of all the facts.¹ This decision may have gone too far, but it is in accordance with the general rule that the rights and equities of all holders of stock back of the registry and issue of the certificates in existence are not allowed to affect the stockholdership or rights of purchasers of these new certificates.

§ 370. *Owner of a lost certificate of stock may obtain new certificate.*—An owner of a certificate of stock who has lost it or had it stolen from him may, by taking proper proceedings or by giving proper security to the corporation, have new certificates issued to him. In Louisiana it is held that, upon satisfactory proof of the loss of certificate of stock, a writ of *mandamus* will issue to compel the corporation to issue new certificates, and that no bond of indemnity need be given.² But the better rule seems to be that, except in cases of the clearest proof of loss, the corporation shall not be required to issue new certificates unless a bond of indemnity against its liability to possible legal holders of the lost certificate shall be given.³ In New York, by statute, security may be required in all such cases.⁴ A stockholder may file a bill in equity to compel the corporation to issue to him a new certificate of stock in place of one that is

need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. *Winter v. Montgomery Gaslight Co.*, 89 Ala. 544 (1889).

¹ *Mandlebaum v. North Am. Min. Co.*, 4 Mich. 465 (1857).

² *State v. New Orleans Gas Light Co.*, 25 La. Ann. 413 (1873).

³ *Galveston City Co. v. Sibley*, 56 Tex. 269 (1882), where one who became a stockholder in 1841 died in 1865, and his heirs applied for a new certificate in 1878; *Société Générale v. Walker*, L. R. 11 App. Cas. (H. L.) 20 (1885), affirming *Société Générale v. Tramways Union Co.*, L. R. 14 Q. B. D. 424; *Butler v. Glen Cove Starch Co.*, 18 Hun, 47 (1879). A corporation need not issue new certificates of stock in place of those which are

lost unless a bond of indemnity be given. *Guilford v. Western U. Tel. Co.*, 43 Minn. 434 (1890). No bond of indemnity will be required where twelve years have elapsed since the certificate of stock was lost. A citizen of Minnesota may sue in its courts to compel a foreign corporation to issue a new certificate if proper service can be had. The fact that two prior judgments in New York and Minnesota required an indemnity bond to be given is no bar to a third suit five years later. *Guilford v. Western U. Tel. Co.*, 59 Minn. 332 (1894).

⁴ This statute does not give a remedy to a purchaser of stock at a receiver's sale. If he is unable to obtain the outstanding certificates his remedy is different. *Re Biglin v. Friendship Assoc.*, 46 Hun, 223 (1887).

lost, even though the statute gives an additional remedy.¹ It would seem reasonable that a bond of indemnity should be given to the corporation, since, in case the old certificate has not been lost, but has been sold by its owner, the corporation is liable in damages, or to replace the stock to the purchaser, for issuing new certificates without a surrender of the old.² Where certificates of stock have been lost, and a party turns up with them and applies for transfer on the corporate books, the real owner may enjoin a transfer of the certificate, and also any transfer by the corporation on its books, *pendente lite*.³

E. CONFISCATION OF STOCK.

§ 371. During the late Rebellion, acts of confiscation were passed, both by the United States government and by the Confederate government, and shares of stock owned by parties in one section of the country in corporations domiciled in the other section were confiscated. The result of the war having established that the Confederate government was an illegal one, all its acts of confiscation became null and void, and all transfers and registers of stock thereunder were held to be void utterly. The whole line of transactions based on the confiscation fell with the confiscation itself.⁴ The corporation was held not liable to purchasers whose title was based on the confiscation, since it acted under compulsion of a power temporarily greater than the law itself.⁵ If the corporation neglects to remedy the confusion and claims growing out of the illegal confis-

¹ *Kinnan v. Forty-second, etc. R'y*, 140 N. Y. 183 (1893).

² See §§ 358-360, *supra*. Persons receiving a duplicate certificate on the ground of loss of the original may be compelled by the company to return it where the original turns up in another person's hands, the certificate having been sold to the latter by the former owner. *New York Cent. etc. R. R. v. Stokes*, N. Y. L. J., Nov. 16, 1888, p. 1091. In *Keller v. Eureka, etc. Co.*, 43 Mo. App. 84 (1890), the court held that the corporation need not issue an ordinary certificate in place of one that was lost, but might

write upon the new certificate the word "duplicate." The issue by a corporation of new certificates of stock in place of lost certificates does not constitute an overissue of stock. *Kinnan v. Forty-second, etc. R. R.*, 21 N. Y. Supp. 789 (1893); *aff'd*, 140 N. Y. 183.

³ *Sierra Nevada, etc. Co. v. Sears*, 10 Nev. 346 (1875).

⁴ *Dewing v. Perdicaries*, 96 U. S. 193 (1877).

⁵ *Dewing v. Perdicaries*, 96 U. S. 193 (1877); also *Central R. R. etc. Co. v. Ward*, 37 Ga. 515 (1868).

cation of stock, any stockholder may institute an action in its behalf for that purpose.¹ The stock is to be restored to the owner against whom the confiscation proceedings were had; and if the corporation, during the Rebellion, voluntarily paid dividends to the illegal holders of the stock, it must pay the same to the plaintiff, even though it would have been compelled to pay such dividends to the Southern holder if it had not done so voluntarily.² On the other hand, proceedings for the confiscation of stock under the confiscation acts of the United States government, passed by reason of the late Rebellion, are held to have been effective if in accordance with established rules of procedure. Where, however, no notice of the proceedings was given to the defendant, and her name and the stock were not accurately described, the proceedings were void; and the corporation, having obeyed the illegal judgment of confiscation, was held liable in damages to the Southern owner of the stock.³

¹*Perdicaris v. Charleston Gas-light Co.*, Chase's Dec. 435 (1869); S. C., 19 Fed. Cas. 217; affirmed *sub nom. Dewing v. Perdicaries*, 96 U. S. 193 (1877).

²*Keppel v. Petersburg R. R.*, Chase's Dec. 167 (1868); S. C., 14 Fed. Cas. 357.

³*Chapman v. Phoenix Nat. Bank*, 85 N. Y. 437 (1881), reversing S. C., 44 N. Y. Super. Ct. 340. See also *Avil v. Alexandria Water Co.*, 1 Hughes, 408 (1877); S. C., 2 Fed. Cas. 254.

CHAPTER XXII.

SALES OF STOCK—FORMAL METHOD OF TRANSFERRING CERTIFICATES AND REGISTRY THEREOF.

§ 372. Subject treated herein.

373. The two usual steps in perfecting a transfer of stock.,

374. Omission of either or both steps.

A. METHOD OF TRANSFERRING THE CERTIFICATE.

375. Usual forms of assignment and powers of attorney whereby the transferrer assigns the certificate of stock to his transferee.

376. Questions which arise herein.

377. A seal is not necessary to a transfer of stock.

378. The assignment of the certificate of stock estops the transferrer from claiming any further title in the stock as against subsequent *bona fide* transferees, although such assignment be not registered.

379. Effect of charter provision requiring registry.

380. Certificate of stock may be assigned with the name of the transferee left blank.

B. METHOD OF REGISTERING A TRANSFER OF STOCK.

381. Registry an important part of a transfer of stock.

§ 382. Formalities of making registry—Stock ledger not necessary.

383. Formalities of registry may be waived by the corporation.

384. Either the transferrer or the transferee may apply to the corporation for a registry of transfer.

C. RIGHTS AND DUTIES OF THE CORPORATION IN ALLOWING OR REFUSING REGISTRY.

385. Corporation may require proof of identity; also of genuineness of signature, etc.

386. Corporation cannot refuse registry on account of the motive of the transferrer or transferee in the transaction.

387. Corporation may interplead between two claimants to stock.

388. Corporation must obey mandate of court ordering registry and issue of new certificates.

389. Remedies of a transferee of stock against the corporation for refusal to allow registry.

390. Remedy by *mandamus*.

391. Remedy by suit in equity.

392. Remedy by an action for damages.

§ 372. *Subject treated herein.*—Having considered the competency of parties to enter into a contract of sale of stock;¹ the legality, enforceability, and character of that contract;² and the rights of third parties as affecting the contract between the transferrer and transferee,³—it is now necessary to discuss certain formalities whereby the title to stock is transferred. These formalities are peculiar to sales of stock. The

¹ Ch. XIX, *supra*.

² See ch. XX, *supra*.

³ Ch. XXI, *supra*.

only analogy to them is perhaps that arising from the making of a deed of real estate, and a registry of the same at a recorder's office. In many respects, however, this analogy does not apply. Thus, the corporation itself has many rights and duties herein which a register of deeds has not. The principles of law governing the formalities of transfer of stock have occasioned great difficulties and much litigation. The rules given herein have arisen for the most part out of the necessities and demands of business as sanctioned by the courts. They have been gradually formed, and still bear the imprints of the transition stage of a newly-created law.

§ 373. *The two usual steps in perfecting a transfer of stock.*—To transfer a share of stock there are generally two distinct steps to be taken: First, the certificate is assigned by the transferrer to the transferee; and second, that assignment and transfer are perfected and completed by delivering the assigned certificate to the corporation, obtaining an entry on the corporate transfer book to the effect that the transferee has purchased the stock of the transferrer, and taking from the corporation new certificates of stock certifying that the newly-recorded stockholder owns a specified amount of stock. The corporation then cancels the old certificate of stock¹ and posts the transfer into the stock-book.²

§ 374. *Omission of either or both steps.*—Either and even both of these two steps in the complete transfer of stock may be omitted; and yet, where the facts estop the various parties from denying that a transfer has been made, it will be held to be complete. Thus, it has been held that an owner of stock may transfer his stock to another by a delivery of the certificate without any assignment.³ This happens when a registry of transfer is made without any surrender of the old certificate.⁴

¹In *Knox v. Eden Musée, etc. Co.*, 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer, and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge

from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock.

²The purposes of the stock-book are explained in § 14, *supra*.

³See § 308, 465, note, *infra*.

⁴See § 360, *supra*.

So far as the transferrer is concerned such a method of transfer is effectual. Such cases also arise where the corporation has never issued certificates of stock. The stockholder may then transfer his stock without assigning a certificate.¹

A. METHOD OF TRANSFERRING THE CERTIFICATE.

§ 375. *Usual forms of assignment and powers of attorney whereby the transferrer assigns the certificate of stock to his transferee.*—A certificate of stock is a paper issued by the corporation to a stockholder, stating that the person specified therein is the owner of a certain number of shares of its capital stock. The assignment of this certificate is made, it seems, in three different ways: First, it has been held that it may be made by a simple delivery of the certificate without any writing.² Again, it may be made by a formal instrument of assignment duly signed by the transferrer. This instrument may be separate from the certificate of stock or may be printed in blank on the back of it. In either case, in order to make the transfer complete by a registry of it on the corporate books, it is necessary for the transferrer to go to the office of the corporation and

¹ *Brigham v. Mead*, 92 Mass. 245 (1865); *First Nat. Bank v. Gifford*, 47 Iowa, 575 (1877). See also § 382, *infra*. Although the charter prescribes that stock shall be transferred in such manner as the by-laws direct, yet, if the by-laws do not provide for transfers, a common-law transfer is sufficient. An oral transfer is sufficient where no certificates have been issued, and where such transferee is entered on the corporate books as a stockholder. *Kiely v. Smyth*, 27 Grant's Ch. (Can.) 220 (1879).

² See § 308, *supra*, where a delivery of a certificate of stock *causa mortis* was held good, without any writing assigning the certificate; and § 465, note, *infra*. See also *Fraser v. Charleston*, 11 S. C. 486 (1878). Cf. *Sitgreaves v. Farmers', etc. Bank*, 49 Pa. St. 359 (1865); *Davis v. Bank of England*, 2 Bing. 393 (1824); *Burrall v. Bushwick R. R.*, 75 N. Y. 211 (1878);

Dunn v. Commercial Bank, 11 Barb. 580 (1852). A deed of release of shares of stock is a sufficient transfer. *Hastings v. Blue Hill Turnp. Corp.*, 26 Mass. 80 (1829). If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. *Taft v. Presidio, etc. Co.*, 84 Cal. 121 (1890). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. *Leyson v. Davis*, 170 U. S. 36 (1898).

sign the transfer in the corporate transfer book, whereby the transfer is recorded. The third and most usual method of assigning a certificate of stock is by a formal instrument of assignment, similar to the one explained above, united with a power of attorney authorizing a person, whose name is generally left blank, to be subsequently filled in, to sign the corporate transfer book, whereby the transfer is recorded. This instrument of transfer and the power of attorney are generally printed in blank on the back of the certificate of stock. It enables the transferee to obtain a registry without the presence of the transferrer, provided the corporate registry agent is satisfied with the signature and intent of the transferrer to assign the stock. Although a transfer is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless a pledgee may be a *bona fide* holder.¹ A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.² The blank power of attorney is generally filled in by the transfer clerk, who inserts his own name and thereby becomes the attorney.³ This power of attorney is not revoked by the death of the transferrer before it is used.⁴ A general power of attorney to sell land and build houses does not justify a sale of stock.⁵ A general power of attorney authorizing an agent to sell and transfer stocks, etc., authorizes him to sign the stockholder's name to a transfer, but not a transfer to himself.⁶ Permitting, without inquiry, a transfer under a power of attor-

¹Smith v. Savin, 141 N. Y. 315 (1894).

²Second, etc. Bank v. Curtiss, 2 N. Y. App. Div. 508 (1896).

³The fact that the officer of the corporation fills in his own name as agent to transfer does not make him the agent of the stockholder as regards notice of the agent's frauds. Allen v. South Boston R. R., 150 Mass. 200 (1889).

⁴Fraser v. Charleston, 11 S. C. 486 (1878); Leavitt v. Fisher, 4 Duer (N. Y.), 1 (1854); United States v. Cutts, 1 Sumn. 133 (1832); S. C., 25 Fed. Cas. 745.

⁵Camden F. Ins. Assoc. v. Jones, 53

N. J. L. 189 (1890), holding also that the corporation is liable for allowing a transfer of stock where the stockholder did not sign the transfer nor authorize another to transfer it.

⁶Taft v. Presidio, etc. Co., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). A stockholder's power of attorney to his agent "to exchange old issues or certificates [of stock], and receive new issues or certificates in lieu thereof," does not authorize the agent to sell or pledge the stock. The corporation is liable for allowing a transfer to a third person on such authority. Quay v. Presidio, etc. R. R., 82 Cal. 1 (1889).

ney thirteen years old is not proper vigilance on the part of a corporation.¹ An agent's written authority to transfer stock is revoked by death.² A transferee who receives new certificates of stock is not affected by the fact that the old certificates are fraudulently re-issued by a corporate officer.³

§ 376. *Questions which arise herein.*—The assignment of a certificate of stock by the transferrer to the transferee, considered apart from the actual registry of such assignment on the corporate books, involves the question whether such an assignment should be under seal; whether, after the assignment, the transferrer can claim any rights of ownership as against the transferee, even though there be no registry of the transfer; and whether a transfer and power of attorney duly signed by the transferrer, but left in blank as to the name of the transferee and attorney, are legal and may pass from hand to hand until some holder cares to fill up the blanks. These and incidental questions are discussed in the following sections.

§ 377. *A seal is not necessary to a transfer of stock.*—In America an assignment or transfer of a certificate of stock need not be under seal.⁴ Formerly it was the custom to have all such transfers made by deed, duly sealed. As the nature of stock and certificates of stock, however, came to be understood more clearly, it became a rule of law that a transfer of the certificate, like the transfer of choses in action, did not require a seal. Not even the presence of the seal gives the transfer the character of a sealed instrument. The seal is a superfluity and is disregarded.⁵

In England, on the other hand, transfers of railway stocks

¹ Pennsylvania R. R.'s Appeal, 86 Pa. St. 80 (1878).

² *In re Kern's Estate*, 176 Pa. St. 373 (1896).

³ See § 292, *supra*. Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. *Galvin v. Mac Mining, etc. Co.*, 14 Mont. 508 (1894).

⁴ *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476 (1813); *Atkinson v.*

Atkinson, 90 Mass. 15 (1864). If, however, the by-laws require it, the transfer must be under seal. *Bishop v. Globe Co.*, 135 Mass. 132 (1883), holding also that the word "seal" is insufficient.

⁵ *German Union, etc. Assoc. v. Sendmeyer*, 50 Pa. St. 67 (1865); *Commercial Bank v. Kortright*, 22 Wend. 348 (1839); *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 (1871); *Bridgeport Bank v. New York, etc. R. R.*, 30 Conn. 231, 274 (1861); *Easton v. London J. S. Bank*, L. R. 34 Ch. D. 95 (1886).

are generally required by charter to be under seal. This is held to give the instrument the character of a deed; and hence, in accordance with the ancient technical rule of law that a deed must be filled out as to the grantee and other essential particulars before it is sealed in order to be valid, it has been held in England that a transfer of a certificate of stock, duly signed and sealed, but with the name of the transferee in blank, is void absolutely.¹ In those English companies, however, whose charters do not require transfers to be sealed, the transfer may be by an ordinary instrument in writing, and the presence of a seal will be disregarded.²

§ 378. *The assignment of the certificate of stock estops the transferrer from claiming any further title in the stock as against subsequent bona fide transferees, although such assignment be not registered.*³—There is no case which denies this principle of law. On close examination of the cases which seem to militate against it, it will be found that the issue in-

¹ *Hibblewhite v. McMorine*, 6 M. & W. 200 (1840), per Parke, B.; *Taylor v. Great Indian, etc. R'y*, 4 De G. & J. 559 (1859); *Société Générale v. Tramways Union Co.*, L. R. 14 Q. B. D. 424 (1884), where transfer was to be by deed; *aff'd, Société Générale v. Walker*, L. R. 11 App. 20 (1885). Cf. § 325, *supra*, and §§ 380, 416, *infra*.

² *Re Tees Bottle Co.*, 33 L. T. Rep. 884 (1876); *Walker v. Bartlett*, 36 Eng. L. & Eq. 369 (1856); *Re Barned's Banking Co.*, L. R. 3 Ch. App. 105 (1867); *Ex parte Sargent*, L. R. 17 Eq. 273 (1874); *Ortigosa v. Brown*, 47 L. J. (Ch.) 168 (1878). Transfer of certificates in England must be under seal. *Re Balkis Consol. Co.*, 58 L. T. Rep. 300 (1888). The American cases incline to the opinion that, even though a seal were required, the sealed transfer would not be void because of the blanks left in it. *Bridgeport Bank v. New York, etc. R. R.*, 30 Conn. 231, 274 (1861); *Commercial Bank v. Kortright*, 22 Wend. 348 (1839); *Matthews v. Massachusetts Nat. Bank*, 1 Holmes, 396, 407 (1874); *S. C.*, 16 Fed. Cas. 1113, 1118; *McNeil*

v. Tenth Nat. Bank, 46 N. Y. 325 (1871).

³ *Scott v. Pequonnock Nat. Bank* (U. S. C. Ct.), 15 Fed. Rep. 494 (1883); *Brown v. Smith*, 122 Mass. 589 (1877); *Fitchburg Sav. Bank v. Torrey*, 134 Mass. 239 (1883); *Duke v. Cahawba Nav. Co.*, 10 Ala. 82 (1846); *Chouteau Spring Co. v. Harris*, 20 Mo. 382 (1855); *St. Louis P. Ins. Co. v. Goodfellow*, 9 Mo. 149 (1845); *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. 637 (1834); *Sargent v. Essex Marine R'y Corp.*, 26 Mass. 202 (1829); *Nesmith v. Washington Bank*, 23 Mass. 324 (1828); *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829); *Conant v. Reed*, 1 Ohio St. 293 (1853); *Baltimore, etc. R'y v. Sewell*, 35 Md. 238 (1871); *Bank of America v. McNeil*, 10 Bush (Ky.), 54 (1873); *U. S. v. Vaughan*, 3 Binn. (Pa.) 394 (1811); *Beckwith v. Burrough*, 13 R. I. 294 (1881); *Farmers', etc. Bank v. Wasson*, 43 Iowa, 336 (1878); *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249 (1880); *Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); *Smith v. Crescent City, etc. Co.*, 30 La. Ann. 1378 (1878); *People's Bank v. Gridley*,

volved was whether the unregistered transferee was protected against third persons who claimed title back of the transferrer. The transferrer himself is not allowed to impeach his unregistered transferee's title. Even in Connecticut, where at an early day the court held that the registry was the originating act of the title of the transferee, the court was considering the rights of third persons, and not the rights of the transferrer himself.¹ That the transferrer cannot question the completeness of his transfer of title is a rule binding not only on himself, but also upon his assignees in bankruptcy or insolvency.² The transferee is estopped also from attacking the assignment of the certificate on the ground of informalities in the transfer.³ A *bona fide* pledge of stock indorsed in blank on the back is protected.⁴ In Maryland, however, a distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities.⁵

91 Ill. 457 (1879). Nor can the transferrer avoid the assignment before registry on the ground that no consideration passed. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.), 484 (1847); *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879). Such an assignment satisfies a contract to sell stock. *White v. Salisbury*, 33 Mo. 150 (1862); *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454 (1879). The fact that the corporation subsequently refuses to register the transfer does not prevent title passing, as between transferrer and transferee. *Crawford v. Provincial Ins. Co.*, 8 Up. Can. C. P. 263 (1859).

¹ *Northrop v. Newtown, etc. Co.*, 3 Conn. 544, 552 (1821); *Fisher v. Essex Bank*, 71 Mass. 373 (1855), the rights of attaching creditors being involved.

² *Ex parte Dobson*, 2 Mont., D. & De G. 685 (1842); *Dickinson v. Central Nat. Bank*, 129 Mass. 279 (1880); *Morris v. Cannan*, 4 De G., F. & J. 581

(1862); *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515 (1882).

³ *Holyoke Bank v. Goodman Paper Mfg. Co.*, 63 Mass. 576 (1852); *Maguire's Case*, 3 De G. & S. 31 (1849); *Sheffield, etc. R'y v. Woodcock*, 7 M. & W. 574 (1841); *Cheltenham, etc. R'y v. Daniel*, 2 Q. B. 281 (1841); *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461 (1880). The legal sufficiency of the instrument of transfer cannot be questioned by the transferrer. *Chew v. Bank of Baltimore*, 14 Md. 299 (1859).

⁴ *Gilbert v. Erie Bldg. Assoc.*, 39 Atl. Rep. 291 (Pa., 1898).

⁵ Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. *German Sav. Bank v. Renshaw*, 28 Atl. Rep. 281 (Md., 1894), a case wherein a broker holding stock on a margin repledged it at a bank.

§ 379. *Effect of charter provision requiring registry.*—This rule prevails even though the certificate or by-laws, or charter itself, declares that a transfer shall not be legal or complete or effectual until it is registered on the corporate books.¹ As between the transferrer and transferee, the unregistered assignment is complete and effectual in contradiction of such declarations. The courts construe these provisions of the certificate or by-laws or charter to be intended, not to affect the rights of the transferee as against the transferrer, but to affect the rights of the transferee as against attaching creditors of his transferrer and other third parties claiming an interest in the stock, and also to affect his right to claim dividends, the privilege of voting, and other rights of a stockholder.²

§ 380. *Certificate of stock may be assigned with the name of the transferee left blank.*—By a commercial usage, which has been repeatedly recognized as valid by the courts, certificates of stock may be assigned by a transfer duly signed by the transferrer, but with the name of the transferee left blank.³ Gen-

¹ *Johnston v. Laffin*, 103 U. S. 800, 804 (1880), affirming 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; *Noyes v. Spaulding*, 27 Vt. 420 (1855), where the court said: "That provision is similar to the statute in this state in relation to the transfer of real estate, under which it has uniformly been held that the title passes to the grantee as between the parties to the conveyance, though the deed is unrecorded. . . . The object of having the transfer recorded on the books of the corporation is notice, and that is the only object. For that reason the transfer, though unrecorded, is good against the party and all those who have notice in fact of the transfer." U. S. v. *Cutts*, 1 Sumn. 133 (1832); S. C., 25 Fed. Cas. 745; *First Nat. Bank v. Gifford*, 47 Iowa, 575 (1877). The same provision was involved in nearly all the cases cited in preceding sections. See also *Johnston v. Underhill*, 52 N. Y. 203 (1873); *Bank of Utica v. Smalley*, 2 Cow. 770 (1824); *Baldwin v. Canfield*, 26 Minn.

43 (1879), where the court said that charter "provisions of this kind are intended solely for the protection and benefit of the corporation; they do not incapacitate a shareholder from transferring his stock without any entry upon the corporation books."

² *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. Rep. 369 (1881); *Merchants', etc. Bank v. Richards*, 6 Mo. App. 454 (1879); and cases cited *supra*, and § 465, *infra*.

³ *Walker v. Detroit Transit R'y*, 47 Mich. 338 (1882); *Pennsylvania R. R.'s Appeal*, 86 Pa. St. 80 (1878); *Cutting v. Damerel*, 88 N. Y. 410 (1882); *German Union, etc. Assoc. v. Sendmeyer*, 50 Pa. St. 67 (1865); *Ex parte Sargent*, L. R. 17 Eq. 273 (1874); *Ortigosa v. Brown*, 47 L. J. (Ch.) 168 (1878); *Re Barned's Banking Co.*, L. R. 3 Ch. App. 105 (1867). Cf. §§ 325, 377, *supra*; § 416, *infra*. A power of attorney on the back of a certificate of stock signed in blank is sufficient to transfer shares of stock in a corporation.

erally the combined instrument of transfer and power of attorney on the back of the certificate is signed by the stockholder and delivered to the purchaser, with the names of the transferee and of the attorney left blank. Such a certificate of stock, transferred in blank, may be sold and passed from hand to hand; and each purchaser of it is entitled to the same rights against his transferrer or previous transferrers as he would have if the names of the successive holders appeared on the certificate itself. Any purchaser of the certificate, duly signed but transferred in blank, may fill up the blanks and insert his own name.¹ He may fill in his own name as transferee, and the name of an agent as the attorney to make the registry, or he may leave the latter blank and allow the registry clerk to fill in his own name, as is frequently done.

B. METHOD OF REGISTERING A TRANSFER OF STOCK.

§ 381. *Registry an important part of a transfer of stock.*—The effect of obtaining a registry or of neglecting to obtain a registry of the transfer on the corporate books, immediately after purchasing the same from the vendor, has given rise to much litigation and much apparent confusion. A registry of the transfer is important in two respects: First, as regards the rights of the purchaser in reference to the corporation; second,

Andrews v. Worcester, etc. R. R., 159 Mass. 64 (1893). "Even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature." *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 331 (1871). "There is no force in the suggestion that the power of attorney in the present case was incomplete, because there were blanks for the number of shares and for the name of the attorney. Any holder might fill up the blanks and constitute himself the attorney. These points are too well settled to need discussion." *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616, 623

(1874). As to the English rule, where the charter requires transfers to be under seal, see § 377, *supra*. See also *Colonial Bank v. Hepworth*, L. R. 36 Ch. D. 36 (1887); *Williams v. Colonial Bank*, L. R. 36 Ch. D. 659 (1887); *Nanney v. Morgan*, L. R. 35 Ch. D. 598 (1887).

¹*Broadway Bank v. McElrath*, 13 N. J. Eq. 24 (1860); *Matthews v. Massachusetts Nat. Bank*, 1 Holmes, 396 (1874); S. C., 16 Fed. Cas. 1113; *Bridgeport Bank v. New York & N. H. R. R.*, 30 Conn. 231 (1861); *Kortright v. Buffalo Com. Bank*, 20 Wend. 91 (1838); *aff'd*, *Commercial Bank v. Kortright*, 22 Wend. 348 (1839); *Otis v. Gardner*, 105 Ill. 436 (1883); *Mount Holly, etc. Co. v. Ferree*, 17 N. J. Eq. 117 (1864); *Prall v. Tilt*, 28 N. J. Eq. 479 (1877); *Leavitt v. Fisher*, 4 Duer, 1, 20 (1854).

in regard to the rights of the purchaser as regards third persons who are either creditors of the old registered stockholders or have claims upon the stock in question. So far as the corporation is concerned, it is bound to recognize only the registered stockholder.¹ To him is accorded the right to vote, draw dividends, and exercise the general rights of stockholdership. The unregistered purchaser of stock cannot claim such rights. All the cases agree in this result of a neglect to register a transfer. As regards the rights of third persons, however, the courts of the different states vary widely in their opinions. Generally the question arises by reason of an attachment or execution levied by a creditor of the transferrer against the stock standing on the corporate books in the name of the transferrer, who has already sold and assigned the certificate of stock to another. As a general rule, it may be said that a purchaser of a certificate of stock is usually protected as fully without a registry on the corporate books as he would be by a registry, so far as subsequent attachments and most other possible equities against the stock are concerned.² This is the rule in New York and most of the states. In Connecticut and some other states a contrary rule prevails. In Massachusetts, Illinois, New Hampshire, and elsewhere, statutes have changed the old rule so that it now accords with that of New York.³

§ 382. *Formalities of making registry — Stock ledger not necessary.*—The customary method of registering a transfer of stock on the corporate books is simple. The registered stockholder, or his attorney in fact, whose name is written in the blank power of attorney, applies to the corporate officer having charge of the transfer books, and requests a registry of the transfer to a person designated by a name written in the form of transfer. Books of transfer are kept for purposes of registering, and upon such an application and a surrender of the old certificate the old stockholder or his attorney makes the registry and a new certificate is issued.⁴

¹ Registry herein means not only an actual registry, but also a request to the corporation to allow registry, where improperly refused by it. See § 382, *infra*.

² These various questions are consid-

ered in chs. XXI, *supra*, and XXVII, *infra*.

³ This statute is referred to in § 488, *infra*.

⁴ *Burrall v. Bushwick R. R.*, 75 N. Y. 211 (1878); *Green Mount, etc. Co. v. Bulla*, 45 Ind. 1 (1873).

Any suitable registry or stock list, or formal entry on the corporate books, suffices. No special book need be kept for that purpose.¹ Where the stock book of the corporation is locked up and cannot be reached, the directors may adopt a new stock book and minute book, and make transfers of stock.² Where the company does not keep a transfer book, the transfer of stock is complete when the owner of stock transfers the certificate on the back and delivers it to the secretary in order that a new certificate may be issued to the transferee.³ The demand for registry should be made upon the principal officer or clerk at the office of the corporation. When so made it is sufficient.⁴ The method of registry may be regulated by the

¹"All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law." *National Bank v. Watson*, 105 U. S. 217 (1881).

²*Re Argus Co.*, 138 N. Y. 557 (1893).

³*Chemical Nat. Bank v. Colwell*, 132 N. Y. 250 (1892). A stockholder is liable by statute on stock where he has merely transferred the certificate and no effort has been made to complete the transfer on the corporate books. Where there is no transfer book, but certificates are merely canceled and new ones issued, this is sufficient to effect a transfer on the corporate books. *Plumb v. Bank of Enterprise*, 48 Kan. 484 (1892). Where the corporation keeps a stock-certificate book but no transfer book, a transfer on the back of a certificate, which is then canceled and pasted

back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute a transferee a stockholder. He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. *American Nat. Bank v. Oriental Mills*, 17 R. I. 551 (1891). A certificate-of-stock book is sufficient to show stockholdership, if there are no transfer or stock books, even though the statute requires the latter to be kept. *Knowles v. Sandercock*, 107 Cal. 629 (1895). A mere memorandum of a sale of stock, made by the corporation in the certificate book, was held a sufficient transfer to sustain a lien in *Bank of Commerce v. Bank of Newport*, 63 Fed. Rep. 898 (1894); 50 N. E. Rep. 903.

⁴"It is sufficient for him to apply at the bank during the usual hours of business, and make his demand upon the officers and clerks who may be in attendance there; and, in case they are not authorized to transact that particular business, they must either refer him to the proper officer in the bank or procure the attendance of such officer, or of the board of direct-

by-laws of the corporation. Thus, a by-law that the stock shall be transferable by indorsement in writing, made in the presence of the cashier or two other witnesses, has been sustained as valid, and is complied with only by the presence and signature of the cashier or of the witnesses.¹ So, also, of a by-law requiring registry in the presence of the president and secretary of the company.² But a by-law requiring the assent of the president of the corporation to the registry of a transfer would be in restraint of trade and void.³ A delivery of certificates to the corporation, and a mere request to the corporate officers to make the transfer, is not a registry until the entry is actually made.⁴

The fact that the registry clerk marks on the instrument of transfer the words "received for record" does not constitute a registry.⁵ A memorandum on the stock-book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment.⁶ It has been held that,

ors, if necessary, without any unreasonable delay. . . . In the absence of any proof to the contrary, it may be fairly presumed that the principal officer or clerk in attendance at the bank, during the usual hours of business, is authorized to permit such a transfer when proper." *Commercial Bank v. Kortright*, 22 Wend. 348, 351 (1839); *Case v. Bank*, 100 U. S. 446 (1879), where application to the cashier was held to be proper; *McMurrich v. Bond Head Harbor Co.*, 9 Up. Can. Q. B. 333 (1852), where the application was to the secretary; *Goodwin v. Ottawa, etc. R'y*, 13 U. C. C. P. 254 (1863), where an application to secretary and treasurer was sustained; *Green Mount, etc. Co. v. Bulla*, 45 Ind. 1 (1873), where the application was to the president. Presentation of the certificate of stock, duly indorsed, to the person in charge of the office of the corporation is a sufficient demand of transfer. *Dunn v. Star F. Ins. Co.*, 19 N. Y. Week. Dig. 531 (1884).

¹ *Dane v. Young*, 61 Me. 160 (1872).

² *Planters', etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585 (1879).

³ *Sargent v. Franklin Ins. Co.*, 25 Mass. 90 (1829).

⁴ *Brown v. Adams*, 5 Biss. 181 (1870); *S. C.*, 4 Fed. Cas. 350. Nor will a mere entry of credit to the transferee, on the treasurer's books, suffice. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579 (1818). Cf. § 258, *supra*.

⁵ *Northrop v. Newtown, etc. Co.*, 3 Conn. 544 (1821); *Northrop v. Curtis*, 5 Conn. 246 (1824). But a memorandum entered on the stub in the stock book opposite to the certificate issued, that that certificate has been transferred, is a sufficient registry as against attaching creditors of the transferrer. *Fisher v. Jones*, 82 Ala. 117 (1887). A mere letter from the transferee to the corporation that he has purchased the certificate is insufficient, even though such letter is pinned to the transfer book. *Newell v. Williston*, 138 Mass. 240 (1885).

⁶ *Moore v. Marshalltown, etc. Co.*, 81 Iowa, 45 (1890).

where the corporation has a branch registry office in another state, a registry in the branch office is not an effectual registry until it has been reported and entered in the books of the main office of the corporation.¹ If the corporation does not keep books for the registry of transfers of stock, a mere notice to the corporation that a transfer has been made constitutes a registry.² But if the statute or charter requires a transfer to be made on the corporate books, no registry is possible until such books are obtained and opened.³ If the corporation never issues certificates of stock, the stockholder cannot demand them.⁴ If the corporation cannot allow the registry on account of an injunction, it is nevertheless bound to respect the rights of a transferee who gives notice to it of the transfer.⁵ The issue of a new certificate of stock is not essential to the completeness of a registry of the transfer.⁶ If the corporation delays unreasonably in allowing a registry, it is liable in damages to the applicant for registry.⁷

The instrument of transfer must be in proper form.⁸ Unless the old stockholder or his duly-authorized attorney offers to

¹ *Pinkerton v. Manchester, etc. R. R.*, 42 N. H. 424 (1861).

² *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263 (1859); *Agricultural Bank v. Wilson*, 24 Me. 273 (1844), holding that a transfer on the books of a corporation of stock for which certificates had not been issued is sufficient to pass the property in the stock, and a valid consideration for a note given in payment.

³ *McCourry v. Doremus*, 10 N. J. L. 245 (1828). Where the corporation keeps no stock ledger, a transfer is sufficiently registered when the old certificate is surrendered, a new one issued, and the new name entered on the subscription list. *Stewart v. Walla Walla, etc. Co.*, 1 Wash. St. 521 (1889).

⁴ *Thorpe v. Woodhull*, 1 Sandf. Ch. 411 (1844). See §§ 61, 192, *supra*.

⁵ *Purchase v. New York Exch. Bank*, 3 Rob. (N. Y.) 164 (1865).

⁶ *First Nat. Bank v. Gifford*, 47

Iowa, 575 (1877); *Chouteau Spring Co. v. Harris*, 20 Mo. 382 (1855).

⁷ *Sutton v. Bank of England*, 1 Car. & P. 193 (1824), where the bank delayed longer than one day, the customary time, and refused to give any reason therefor; *Catchpole v. Ambergate, etc. R'y*, 1 El. & B. 111 (1852), where, by reason of the delay, the stock was forfeited, notice of forfeiture going to the old stockholder. See also *Healey, Companies Law*, 3d ed., p. 93. Although the directors are entitled to reasonable time to decide whether to make a transfer, yet, if they have already made up their minds, the measure of damages for refusal is the price of the stock on the day when the application was made. *Re Ottos, etc. Mines*, [1893] 1 Ch. 618.

⁸ *Queen v. General Cemetery Co.*, 6 El. & B. 415 (1856), holding that the deed of transfer, where a deed is necessary, must be properly drawn.

make the registry, the corporation may refuse to allow it.¹ The power of attorney must run from the previous registered stockholder, and not from an intermediate unregistered transferee of the certificate.² Transfers under bankruptcy or insolvent laws are to be registered like voluntary transfers.³ In England a written acceptance of the stock by the transferee is required.⁴

A mere notice to the corporation that an assignment has been made need not be considered by the corporation.⁵ Where, however, the transferee giving such notice does not obtain registry because the corporation refuses, for any reason, to make the registry, the mere notice must be borne in mind by the corporation, and the rights of the applicant preserved by it, as regards future registries.⁶

§ 383. *Formalities of registry may be waived by the corporation.*—The corporation may waive the formalities connected with a registry of transfer, and when it does so the transferee becomes a stockholder as completely as though registry had been regularly made.⁷ Frequently the waiver arises by plac-

See also *Société Générale v. Walker*, L. R. 11 App. 20 (1885).

¹ *Mechanics' Banking Assoc. v. Mariposa Co.*, 3 Rob. (N. Y.) 395 (1865).

² *Dunn v. Commercial Bank*, 11 Barb. 580 (1852).

³ *Dutton v. Connecticut Bank*, 13 Conn. 493 (1840); *State v. Ferris*, 42 Conn. 560 (1875).

⁴ *Ortigosa v. Brown*, 47 L. J. (Ch.) 168 (1878). The Joint-stock Companies Act of 1856 required such an acceptance. The act of 1862, repealing the act of 1856, prescribed that transfers should be made as was customary, unless the by-laws prescribed otherwise. Hence, in the absence of by-laws, the written acceptance is held to be customary and necessary. In England, where a transfer of stock is made by first applying to the company, and having the company certify that the certificate of stock had been lodged with the company, and then the money is paid, it is held that the party purchasing the stock on the faith of this certificate of the com-

pany cannot hold the company liable although it turns out that the vendor was not entitled to the stock, and consequently, the whole capital stock being already issued, that the transfer could not be made. The court held that the certification was *ultra vires* and hence not enforceable. *Bishop v. Balkis Consol. Co.*, L. R. 25 Q. B. D. 77, 512 (1890), the court, however, dissenting from the view that the certification was *ultra vires*, but holding that the certification did not warrant the title nor the validity of the various documents.

⁵ *Stockwell v. St. Louis Merc. Co.*, 9 Mo. App. 133 (1880).

⁶ See p. 744, note 5, *supra*. See also § 532, *infra*.

⁷ *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487 (1833); *Clowes v. Brettell*, 11 M. & W. 461 (1843); *Sadler's Case*, 3 De G. & S. 36 (1849); *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120 (1849); *Walters's Case*, 3 De G. & S. 149 (1850); *Bain v. Whitehaven*, etc. R'y, 3 H. L. Cas. 1 (1850); *Wills v.*

ing the transferee's name on the list of stockholders, although no formal registry has been had.¹ Even a charter requirement that the consent of the directors to a registry of transfer shall be obtained may be waived by the corporation.² The corporation, by paying dividends to an unregistered transferee of stock, thereby waives the formalities of registry.³ When the corporation refuses to allow a registry for reasons other than those connected with the mere formalities of registry, or for reasons not given to the applicant, it waives its right to insist on them, and cannot afterwards claim that the applicant did not conform to such technicalities.⁴ A failure, however, on the

Murray, 4 Exch. 843 (1850); Yelland's Case, 5 De G. & Sm. 395 (1852); Powis v. Harding, 1 C. B. (N. S.) 533 (1857); Henderson v. Royal British Bank, 7 El. & B. 356 (1857); Daniell v. Royal British Bank, 1 H. & N. 685 and note (1857); East Gloucestershire R'y v. Bartholomew, L. R. 3 Exch. 15 (1867); Ind's Case, L. R. 7 Ch. App. 485 (1872); Weber v. Fickey, 52 Md. 500, 516 (1879); Home Stock Ins. Co. v. Sherwood, 72 Mo. 461 (1880); Isham v. Buckingham, 49 N. Y. 216 (1872). Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes the stock in pledge and causes an indorsement thereof to be made on the stub of the stock book of the corporation, the corporation cannot thereafter claim a lien as against him; and, moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books. Des Moines, etc. Co. v. Des Moines, etc. Bank, 66 N. W. Rep. 914 (Iowa, 1896). See also §§ 258, 260, 262. *supra*.

¹ Upton v. Burnham, 3 Biss. 431, 520 (1873); S. C., 28 Fed. Cas. 831, 833;

Yelland's Case, 5 De G. & Sm. 395 (1852).

² *Ex parte* Walton, 26 L. J. (Ch.) 545 (1857). Likewise where the by-laws contain such a provision. Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120 (1849), holding also that an oversight, whereby the attorney who makes the registry omits to sign the registry, is immaterial.

³ Cutting v. Damerel, 88 N. Y. 410 (1882). Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate-of-stock book that it had been transferred to him, and sends him dividends, he is liable thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the National Bank Act. Horton v. Mercer, 71 Fed. Rep. 153 (1895).

⁴ State v. McIver, 2 S. C. 25 (1870); Bond v. Mt. Hope Iron Co., 99 Mass. 505 (1868), holding that the corporation must put the refusal on the ground of non-conformity with formalities at the time of the application, and cannot afterward raise such. Chouteau Spring Co. v. Harris, 20 Mo. 382 (1855); Robinson v. New

part of the corporation to notify the transferee of a refusal to allow registry is no waiver of such registry.¹

§ 384. *Either the transferrer or the transferee may apply to the corporation for a registry of transfer.*—A person who appears on the corporation books as the holder of stock, but who in fact has sold the stock, has a right to have his transfer recorded on the corporate books, thereby releasing him from liability on the stock.² The vendor may request the corporation to register the transfer, and the corporation may make it at his request. If the vendee refuses to cause registry to be made, the vendor may bring suit in a court of equity to compel the registry of the transfer.³ It has been held also that an intermediate vendor of the stock, whose name has never appeared on the corporate books, may likewise compel a registry to be made.⁴ After an ultimate vendee has been registered, the original vendor cannot have an intermediate vendee and vendor registered as the stockholder.⁵ The corporation may register the transfer, even against the wishes of the transferee.⁶ The transferee also has a right to apply for and compel a registry of the transfer of stock to himself.⁷

Berne Nat. Bank, 95 N. Y. 637 (1884), where the court said: "The requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule."

¹ Gustard's Case, L. R. 8 Eq. 438 (1869).

² "The purchase was in itself authority to the vendor to make the transfer. . . . A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer. . . . If so, it is clear that the vendor may himself request the transfer to be made." Webster v. Upton, 91 U. S. 65, 71 (1875). "If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them." Johnston v. Laflin, 103 U. S. 800, 804 (1880).

³ Wynne v. Price, 3 De G. & S. 310 (1849). See also Birmingham v. Sher-

idan, 33 Beav. 660 (1864); Eustace v. Dublin, etc. R'y, L. R. 6 Eq. 182 (1868).

⁴ Paine v. Hutchinson, L. R. 3 Ch. App. 388 (1868).

⁵ Shaw v. Fisher, 5 De G., M. & G. 596 (1855).

⁶ Upton v. Burnham, 3 Biss. 520, 525 (1873); S. C., 28 Fed. Cas. 833, 835.

⁷ Norris v. Irish Land Co., 8 El. & B. 512 (1857); Daly v. Thompson, 10 M. & W. 309 (1842); Johnson v. Laflin, 5 Dill. 65 (1878); S. C., 13 Fed. Cas. 758; S. C., 103 U. S. 800; Hill v. Pine River Bank, 45 N. H. 300 (1864); Presbyterian Cong. v. Carlisle Bank, 5 Pa. St. 345 (1847); Mechanics' Bank v. Seton, 1 Pet. 299 (1828); Arnold v. Suffolk Bank, 27 Barb. 424 (1857); Sargent v. Franklin Ins. Co., 25 Mass. 90 (1829); Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879). But the complaint must be full and accurate in its averments. Edwards v. Sonoma Valley Bank, 59 Cal. 136 (1881). Where a contract does not merely pledge stock, but

C. RIGHTS AND DUTIES OF THE CORPORATION IN ALLOWING OR REFUSING REGISTRY.

§ 385. *Corporation may require proof of identity; also of genuineness of signature, etc.*—When a transfer of stock is presented to the corporation for registry, if the corporation is in doubt as to the identity of the person presenting it, whether he be the stockholder already registered on the books or the attorney of such, the corporation may require proof of such identity.¹ If it is in doubt as to the competency of the transferrer to sell the stock,² legal proof of such competency must be given. If the applicant for registry applies as the attorney of the registered stockholder, the corporation may require satisfactory evidence of the genuineness of the latter's transfer, or may require the presence of the stockholder himself.³

§ 386. *Corporation cannot refuse registry on account of the motive of the transferrer or transferee in the transaction.*—The corporation has nothing to do with the motive or purpose of the vendor or vendee of the stock.⁴ It can refuse a registry

gives the creditor the legal title and unlimited power of disposition, the creditor may by suit in equity compel the company to allow a transfer, and the transferrer need not be made a party to the suit. *Skinner v. Fort Wayne, etc. R. R.*, 58 Fed. Rep. 55 (1893).

¹ *Telegraph Co. v. Davenport*, 97 U. S. 369 (1878); *Davis v. Bank of England*, 2 Bing. 393 (1824), where the court say the corporation "may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be." *Bayard v. Farmers', etc. Bank*, 52 Pa. St. 232 (1866).

² See §§ 318, 319, *supra*.

³ See note 1, *supra*; and §§ 363-367, *supra*.

⁴ *State v. McIver*, 2 S. C. 25 (1870); *People v. Paton*, 5 N. Y. St. Rep. 316 (1887). But a transfer, merely nominal, to obtain for the transferee certain special privileges, such as free admission to a place of amusement,

may be a fraud on other stockholders and will be set aside. *Academy of Music's Appeal*, 108 Pa. St. 510 (1885). Equity will not compel a corporation to register a transfer of stock when the purpose of the transfer is to obtain the control of the corporation and wreck it. *Gould v. Head*, 41 Fed. Rep. 240, 248 (1890). In an action to compel the unincorporated Standard Oil "trust" to transfer on its books trust certificates which the plaintiff has purchased, the defendants, who allege that the plaintiff is a competitor of the trust and purchased the certificates in order to break up the trust and compel it to buy the plaintiff out, may be compelled to give a bill of particulars. *Rice v. Rockefeller*, N. Y. Daily Reg., May 29, 1888. The plaintiff in this case finally succeeded. (134 N. Y. 174—1892.) Where a corporation is sued for damages for a refusal to transfer stock, the company cannot set up that the plaintiff acquired his stock by an illegal gambling contract, there being nothing

only when there is doubt as to the legal right of the applicant to have such registry. It cannot refuse on the ground that the transfer would injure the corporation, nor on the theory that the object of the transfer is to increase the votes of the transferee.¹ In England often the directors are by charter given a discretionary power to refuse a transfer.²

§ 387. *Corporation may interplead between two claimants to stock.*—The task imposed upon a corporation in determining whether to refuse or to allow a registry of stock is a difficult and dangerous one. It is easy to avoid the risk of forgery or of failure of the applicant to identify himself. But circumstances frequently are such that the corporation dare not allow registry to either of two parties, each of whom claims to be the sole and absolute owner of the stock, and each of whom claims the right of registry or notifies the corporation not to register the other claimant as a stockholder. These cases arise on various occasions, but most often where the stock has been attached or sold on execution by the transferrer's creditors before the transferee has obtained registry; or where, by the fraud of the old stockholder's agent, the certificate has passed into the hands of a *bona fide* purchaser; or where, by a breach of trust, an executor or administrator, or trustee or guardian, has sold the trust stock and appropriated the proceeds; or under other states of fact wherein there are two claimants of the stock, each

to show that the prior owner objected or made any claim upon the company; nor is it any defense that the stock was held as collateral security for a debt which was barred by the statute of limitations, that defense being personal to the debtor. *Miller v. Houston, etc. R'y*, 55 Fed. Rep. 366 (1893).

¹ *Moffatt v. Farquhar*, L. R. 7 Ch. D. 591 (1878).

² See Healey, Companies Law, 3d ed., p. 90. Where the directors are authorized by the articles of incorporation to reject a transfer of stock on the ground that they do not approve of the transferee, "the discretionary power is of a fiduciary nature and must be exercised in good faith; that

is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." It is not a sufficient reason that the transferee is not a member of a particular family, and the directors will be ordered to make the transfer. *Re Bell*, 65 L. T. Rep. 245 (1891).

having rights which can be clearly ascertained only by litigation. It is not incumbent on the corporation to decide between these conflicting parties and rights.¹ Such a requirement would expose it to unreasonable risks and compel it to assume the functions of a court. Where there is a reasonable doubt as to the facts involved or as to the respective rights of the claimants of the stock, and the corporation is sued by one of the claimants for refusing to allow a registry by him, the corporation may interplead, and thus compel the claimants to ascertain their rights through the medium of a court of justice.² A simi-

¹The discussion of the duty of the corporation in various circumstances is given under chapters devoted to them. See also § 361, *supra*.

²*Mechanics' Bank v. Richards*, 6 Mo. App. 454 (1879); *aff'd*, 74 Mo. 77; *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100 (1874); *Leavitt v. Fisher*, 4 Duer (N. Y.), 1 (1854). In *Lovell v. Jacobs*, 150 N. Y. 84 (1896), a trust company, acting as depository for stock which had been sold on certain conditions, sustained a bill of interpleader, the vendor having claimed that the stock should not be delivered and the vendee claiming the contrary. In *Equity Gas Light Co. v. McKeige*, 139 N. Y. 237 (1893), where a bailee of stock was sued by one of the claimants for the return of the stock, the court said: "The defendant may ordinarily protect himself by bringing suit in the nature of a bill of interpleader, making the different claimants parties." If the court decides that the interpleader is properly filed by the corporation herein, it generally on a motion dismisses the proceeding with costs to the corporation, and the court also decides between the defendants if the case is ready as between them. If not ready, it directs an action or an issue, or a reference to a master, to ascertain contested facts, as may be best suited to the nature of the case; "or the court may leave it to the defendants to prepare the case between them as

they may be advised, which would be the effect of a general order to interplead." *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100 (1874), citing, as cases on above rules of practice, *East, etc. Co. v. Littledale*, 7 Hare, 57, 62 (1848); *Martinius v. Helmuth*, 2 Ves. & B. 412, note (1817); *Horton v. Baptist Church*, 34 Vt. 309, 317 (1861); *Rowe v. Matteson*, 7 N. J. Eq. 131 (1848); *Crawford v. Fisher*, 1 Hare, 436, 441 (1842); *Condict v. King*, 13 N. J. Eq. 375, 383 (1861); *Hendrickson v. Shotwell*, 1 N. J. Eq. 505 (1802); *City Bank v. Bangs*, 2 Paige, 570 (1831); *Angell v. Hadden*, 16 Ves. Jr. 202 (1809).

In *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 82 (1874), the court also said: "The law is that the mere pretext of a conflicting claim is not sufficient; the court must be able to see from the facts stated that there is a question to be tried." In England, by section 35 of the Companies Act, 1862 (25 & 26 Vict., c. 89), a corporation may interplead between two claimants of stock, and need not pay costs. *Re Kimberley, etc. Min. Co.*, 58 L. T. Rep. 305 (1888). An interpleader was sustained in *Bangor, etc. Co. v. Robinson*, 52 Fed. Rep. 520 (1892). Where a judgment creditor levies on stock standing in the name of a dummy for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has jurisdiction in order to decree a

lar interpleader may be made where the corporation is sued for dividends which are claimed by two opposing parties.¹

There is some doubt and considerable difficulty in laying down rules as to when a corporation may safely claim a right to refuse to act, and to compel the claimants to litigate between themselves before it allows a registry to either. The policy of the law doubtless is to go very far in allowing the corporation to refuse to incur responsibility by taking action. Where, however, the rights of one claimant are reasonably clear, the corporation should suspend action for a reasonable time within which the contesting party may apply to the courts; and if no such action is brought, it should allow a registry by the first-named claimant.² Any other rule would enable any person to practically deprive a stockholder of the possession of his stock tem-

transfer. *Spencer v. James*, 10 Tex. Civ. App. 327 (1895). In *Langston v. Boylston*, 2 Vesey, Jr. 101 (1793), where a bailee of bonds was sued by the bailor for conversion for not delivering up the bonds to the latter, although attachments had been levied on them, the bailee sustained a bill of interpleader. In *Cady v. Potter*, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old certificate. The author himself, as recently as 1897, has maintained, in the New York supreme court, a suit of interpleader by a corporation as between two claimants of stock, together with an injunction against the prosecution of a suit at law commenced by one of the claimants against the corporation for damages for refusal to transfer the stock.

¹*Salisbury Mills v. Townsend*, 109 Mass. 115 (1871); *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 (1889). Quere, as to whether an action for dividends can be maintained before the right of the claimant to the stock is established. *Hughes v.*

Vermont Copper Min. Co., 72 N. Y. 207 (1878). See also § 538, *infra*.

²*State v. McIver*, 2 S. C. 25 (1870). A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. *Hinckley v. Pfister*, 83 Wis. 64 (1892). If the corporation allows a transfer to be made during the pendency of a suit between two claimants therefor, and the corporation has notice, it is not liable to the successful party, who is thereby deprived of the stock, there having been no injunction *pendente lite*. *Hawes v. Gas, etc. Co.*, 12 N. Y. Supp. 924 (1891). An interpleader is proper even though no suit has been actually commenced against the corporation. See Story's Eq. Juris., § 808; *Daniell, Ch. Pl. & Pr.*, pp. 1561, 1564, notes. In New York, under the Code of Civil Procedure, an order for interpleader can only be granted after a suit has been commenced against the corporation. *Buffalo Grape Sugar Co. v. Alberger*, 22 Hun, 349 (1880). As to the proper allega-

porarily, by simply notifying the corporation that he claims the stock.¹ Where, however, the corporation has allowed one claimant to register his transfer, or has recognized him as a stockholder, the right of the corporation to interplead is gone.² It cannot afterwards remove the name of the registered stockholder, especially where such stockholder has acted in reliance upon such registry.³

§ 388. *Corporation must obey mandate of court ordering registry and issue of new certificates.*—The authorities on this proposition of law are few in number, but they are decisive in protecting the corporation from liability where it proceeds under mandate of a court. Thus, where a decree is obtained commanding the corporation to register a transfer, the corporation is protected in obeying the decree, even though it is reversed on appeal, there having been no stay of proceedings.⁴ Cases herein may arise also where the registered stockholder alleges that he has lost his certificate, and the court compels the corporation to issue to him a new one;⁵ also where an attachment or execution has been levied, the old certificate of

tions, see *Crane v. Macdonald*, 118 N. Y. 648 (1890), involving a *suit*.

¹ *Ex parte* Sargent, L. R. 17 Eq. 273 (1874).

² *Dalton v. Midland R'y*, 12 C. B. 458 (1852); *Mt. Holly, etc. Co. v. Ferree*, 17 N. J. Eq. 117 (1864). If the party has favored one of the two parties, as by voluntarily agreeing with the sheriff to recognize an execution, an interpleader will not lie. *Cromwell v. American Loan, etc. Co.*, 57 Hun, 149 (1890). See also *American Tel. etc. Co. v. Day*, 20 J. & S. (N. Y.) 128 (1885). A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him, where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. *American, etc. Co. v. Bayless*, 91 Ky. 94 (1891).

³ *Ward v. Southeastern R'y*, 2 El. & El. 812 (1860); *Hart v. Frontino, etc. Co.*, L. R. 5 Exch. 111 (1870);

Cohen v. Gwynn, 4 Md. Ch. 357 (1848). Unless there clearly is a clerical mistake and the issue is to the wrong party. *Smith v. North Am. Min. Co.*, 1 Nev. 423 (1865). The corporation is liable for such mistakes. *Harrison v. Pryse*, Barn. Ch. 324 (1740).

⁴ *Chapman v. New Orleans, etc. Co.*, 4 La. Ann. 153 (1849). See also *Purchase v. New York Exch. Bank*, 3 Rob. (N. Y.) 164 (1865). But when the court directs the corporation to issue a certificate to the life tenant of stock, the corporation is still bound to notify a purchaser of that certificate that it represents a life interest only; otherwise the corporation is liable to the remainder-man. *Caulkins v. Gaslight Co.*, 85 Tenn. 683 (1887). A corporate officer is guilty of contempt if he refuses to obey an order of court requiring him to make certain transfers of stock upon the surrender of the old certificates. *King v. Barnes*, 113 N. Y. 476, 655 (1889).

⁵ See §§ 368-370, *supra*.

stock being outstanding.¹ There is a limit, however, to the power of courts in these matters. If the whole capital stock has been issued and the certificates therefor are outstanding, a court cannot order the issue of other certificates, unless the decree at the same time practically nullifies a corresponding outstanding certificate.²

§ 389. *Remedies of a transferee of stock against the corporation for refusal to allow registry.*—Where, for any reason, the corporation refuses to allow the registry of a transfer of stock, when it is the duty and obligation of the corporation to allow it, the transferrer or the transferee who applies for registry may, in general, pursue one of three remedies. He may apply to a court of law for a mandamus to the corporation to compel it to open its books and allow the registry; or he may bring a suit in equity, praying that the corporation be decreed to allow the registry, or to pay him damages if registry is impossible; or he may sue the corporation at law for damages, on the ground that by its refusal it has been guilty of a conversion of his stock.

§ 390. *Remedy by mandamus.*—The authorities are in irreconcilable conflict on the question whether a mandamus lies to compel a corporation to allow a registry on its books of a transfer of stock. The weight of authority holds very clearly that the mandamus will not lie under such circumstances.³ This

¹ See § 490, *infra*.

² See § 284, *supra*. Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. *Bean v. American Loan, etc. Co.*, 122 N. Y. 622 (1890).

³ The leading case in this country is *Shipley v. Mechanics' Bank*, 10 Johns. 484 (1813), where the court said: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock

if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by mandamus in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents; and there cannot be any necessity, or even a desire, of possessing the identical shares in question." *Ex parte Fireman's Ins. Co.*, 6 Hill (N. Y.), 243 (1843); *People v. Parker Vein Coal Co.*, 10 How. Pr. 543 (1854); *State v. Rombauer*, 46 Mo. 155 (1870); *State v. St. Louis, etc. Co.*, 21 Mo. App. 526 (1886); *Rex v. London Assur. Co.*, 1 Dowl. & R. 510 (1822); *Stackpole v. Seymour*, 127 Mass. 104 (1879); *Rex v. Bank of England*, 2 Doug. 524 (1780); *Curry v. Scott*, 54 Pa. St. 270, 276

rule is based largely on the historical origin of the writ of mandamus, and on the theory that the stock of a private corporation has no peculiar value, and may be readily obtained in open market or fully compensated for in damages. It is

(1867); *Gray v. Portland Bank*, 3 Mass. 364, 381 (1807); *State v. Guerrero*, 12 Nev. 105 (1877); *People v. Miller*, 89 Hun, 557 (1886); *Baker v. Marshall*, 15 Minn. 177 (1870), where the stock had already been issued to another; *Wilkinson v. Providence Bank*, 3 R. I. 22 (1853); *Kimball v. Union Water Co.*, 44 Cal. 173 (1872); *Birmingham F. Ins. Co. v. Commonwealth*, 92 Pa. St. 72 (1879), where the court says that even if the courts "were inclined to enlarge the remedy, it could not be done in a case where the right is disputed, where no public interest is involved, where no reason is shown for a transfer of a specific and favorite thing, and where the remedy by action is fully adequate;" *Townes v. Nichols*, 73 Me. 515 (1882), where the court vigorously says: "All the authorities declare that the remedy by mandamus cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, mandamus must be withheld. Mandamus is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary lawsuits or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced and needs its assistance." See also *Rex v. Worcester, etc. Nav. Co.*, 1 Man. & R. 529

(1828); *Regina v. Liverpool, etc. R'y*, 21 L. J. (Q. B.) 284 (1852); *Murray v. Stevens*, 110 Mass. 95 (1872), where the court said, in refusing a mandamus to compel a registry of stock: "Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not intended and is not well adapted for the trial of mere questions of property;" *State v. Warren Foundry, etc. Co.*, 32 N. J. L. 439 (1868), where a previous transfer had been registered, although possibly in fraud of creditors; *Freon v. Carriage Co.*, 42 Ohio St. 30 (1884), refusing a mandamus, although it is said "that this stock has no market value, that the corporation is doing a growing and profitable business, that its goodwill enhances the value of the stock, and that by reason of these things damages will not be an adequate remedy. These facts do not change the rule. They are elements in assessing damages, which may be fully ascertained in an action at law." See also *Pomeroy, Eq. Jur.*, § 1412; *State v. People's Bld'g, etc. Assoc.*, 43 N. J. L. 389 (1881); *State v. Timken*, 48 N. J. L. 87 (1886); *Tobey v. Hakes*, 54 Conn. 274 (1886), refusing a mandamus on the corporate secretary; *Bank of State v. Harrison*, 66 Ga. 696 (1881). See also *Lindley, Company Law*, pp. 61, 604. Mandamus does not issue to compel a corporation to transfer stock when there is no written transfer of the certificate, and another party claims it. *Burnsville Turnp. Co. v. State*, 119 Ind. 382 (1889). Mandamus does not lie to compel a corporation to transfer stock. *People v. Brandis Mfg. Co.*, N. Y. L. J., Dec. 11, 1889. Mandamus does not lie against the Bank of England to compel it to

doubted, however, whether these reasons will be sufficient to restrain the manifest tendency to enlarge the scope of this writ, particularly with reference to stock transactions. There is a strong line of decisions which holds that a mandamus lies to compel a corporation to allow a registry of a transfer of stock, particularly where the corporation has no good and sufficient reason for refusing the registry.¹ Perhaps the strongest argument against granting a mandamus for this purpose lies in the fact that by a bill in equity not only can a registry be specifically decreed and ordered by the court, but the rights of the corporation and any other claimant can be fully and finally heard and disposed of.

§ 391. *Remedy by suit in equity.*—This is, it seems, the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock, and for adjusting the various conflicting rights or claims of other parties.² It is a remedy

register a transfer of stock to an individual and a corporation jointly. *Law Guarantee, etc. Soc. v. Bank of England*, L. R. 24 Q. B. D. 406 (1890). Mandamus is not the proper remedy to compel the issue of a certificate of stock. *State v. Carpenter*, 51 Ohio St. 83 (1894).

¹*People v. Goss, etc. Co.*, 99 Ill. 355 (1881); *State v. First Nat. Bank*, 89 Ind. 302 (1883); *Green Mount, etc. Co. v. Bulla*, 45 Ind. 1 (1873); *People v. Crockett*, 9 Cal. 112 (1858); *State v. McIver*, 2 S. C. 25 (1870); *State v. Cheraw, etc. R. R.*, 16 S. C. 524 (1881); *Cooper v. Dismal Swamp, etc. Co.*, 2 Murph. (N. C.) 195 (1812); *Norris v. Irish Land Co.*, 8 El. & Bl. 512 (1857); *Regina v. Carnatic R'y*, L. R. 8 Q. B. 299 (1873); *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263 (1859); *Goodwin v. Ottawa, etc. R'y*, 13 U. C. C. P. 254 (1863), holding also that the mandamus may run to the corporation itself without specifying any officers, and that an evasive answer by them is equivalent to a refusal to register. It has been held that mandamus will issue to aid the sheriff in transferring stock sold on an execution sale. This rule, however, would work

harshly in states where the purchaser of the outstanding certificate may have some rights. Where such a possibility exists the mandamus should be denied. *State v. First Nat. Bank*, 89 Ind. 302 (1883); *Bailey v. Strohecker*, 38 Ga. 259 (1868); *Durham v. Monumental, etc. Co.*, 9 Oreg. 41 (1880). Mandamus will lie to compel the corporation to transfer the stock on its books where any other record would be inadequate because there is no market value for the stock, and because the company has fraudulently transferred its property for the purpose of injuring the value of the stock. The mandamus will lie although a suit is pending in equity to accomplish the same purpose. *Slemmons v. Thompson*, 23 Oreg. 215 (1892).

²*Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879); *Walker v. Detroit Transit R'y*, 47 Mich. 338 (1882); *Isagi v. Chicago, etc. R. R.*, 129 Mass. 46 (1880); *Mechanics' Bank v. Seton*, 1 Pet. 299 (1828); *Wilson v. Atlantic, etc. R. R.*, 2 Fed. Rep. 459 (1880); *Middlebrook v. Merchants' Bank*, 3 Abb. App. Dec. 295 (1866); *Buckmaster v. Consumers' Ice Co.*, 5 Daly,

applicable to almost all cases arising under a refusal of the corporation to allow a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not

313 (1874). In *Rice v. Rockefeller*, 134 N. Y. 174 (1892, reversing 9 N. Y. Supp. 866), a court of equity compelled the trustees of a trust to transfer on their books trust certificates which had been purchased in open market by a person who then applied to the trustees for a transfer. The court based its decision on the similarity of such trust certificates to stock certificates, and said: "The denial of the right to transfer upon the books is not consistent with the transferable quality of the shares, which imports that the purchaser taking an assignment of them in a duly formal manner has the right to become a transferee within the meaning of the agreement upon which the trust was formed. . . . In such case it is within the equitable power of the court to compel such transfer to be made." The court held also that it was immaterial that the purchaser who applied for the transfer was hostile to and a competitor of the trust. The court said that although it would have been legal in the beginning to have vested a discretion in the trustees as to allowing transfers, yet that, such discretion not having been reserved, it could not be exercised by the directors. Suit in equity lies. *White v. Price*, 39 Hun, 395 (1886); *aff'd*, 108 N. Y. 661 (1888); *Iron R. R. v. Fink*, 41 Ohio St. 321 (1884), the court saying that the power of equity to decree a registry is well settled. As regards the pleadings, see *Burrall v. Bushwick R. R.*, 75 N. Y. 211 (1878). See also § 579, *infra*. Suits herein frequently arise wherein a complainant claims stock which is registered in the name of another. The chief defendant is that other party. But it is necessary also that the corporation be made a party defendant, in order that a transfer may be decreed on the

corporate books. For equitable action to compel a corporation to issue stock to a purchaser of the same from one of the parties defendant, see *Tanner v. Gregory*, 71 Wis. 490 (1888); *Kendig v. Dean*, 97 U. S. 423 (1878); *Budd v. Munroe*, 18 Hun, 316 (1879), the latter case holding also that the corporation may recover costs against a co-defendant who is defeated in the suit; *Johnson v. Kirby*, 65 Cal. 482 (1884). In such cases the corporation is but nominally concerned in the result of the suit. It cannot appeal from the judgment when both of the real parties in interest are satisfied and do not appeal. *Board of Liquidation v. New Orleans Water-works Co.*, 39 La. Ann. 202 (1887). If the complainant is a citizen of the same state as the corporation, one of the parties defendant, another defendant cannot remove the case into a United States court. *Crump v. Thurber*, 115 U. S. 56 (1885). In an action against the secretary of a corporation to compel him to register a transfer of stock, the corporation is not a necessary party. *Gould v. Head*, 41 Fed. Rep. 240 (1890).

The federal courts have jurisdiction of a suit in equity brought by a citizen of one state to compel a corporation of another state to transfer on its books certain shares of stock which the complainant purchased from a citizen of the same state as the defendant. *Jewett v. Bradford, etc., Co.*, 45 Fed. Rep. 801 (1891). If the holder of a certificate of stock has applied for transfer and been refused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock. *Hill v. Atoka, etc. Co.*, 21 S. W. Rep. 508 (Mo., 1893). This case arose again in 124 Mo. 153. An agreement of the holder of a majority of the stock that he will retain control is no defense

be decreed if it involves bad faith.¹ The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof.² If all the stock has already been issued, equity has no power to compel a further issue.³ Laches or the statute of limitations may also be a bar.⁴

by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. *Weller v. Pace Tobacco Co.*, 25 N. Y. Week. Dig. 581 (1886). A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock, and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will order a transfer free from the agreement. *Campbell v. American Zylonite Co.*, 122 N. Y. 455 (1890). Even though the charter of an irrigation company provides that no one shall hold stock, except an owner of land to the amount of one acre for each share of stock held by him, yet where the stock is sold for non-payment of assessments the purchaser at such sale is entitled to a transfer on the corporate books, although he owns no land. The purchaser may file a bill in equity to determine his rights. The court found it unnecessary to pass on the question as to whether such a restriction as to the stock is legal. *Spurgeon v. Santa Ana, etc. Co.*, 52 Pac. Rep. 140 (Cal., 1898).

¹ *Regina v. Liverpool, etc. R'y*, 21 L. J. (Q. B.) 284 (1852). Cf. *Rice v. Rockefeller*, 134 N. Y. 174 (1892).

² Quoted and approved in *State v. Carpenter*, 51 Ohio St. 83 (1894). "A

bill in equity may be maintained by a *bona fide* purchaser of stock against the corporation to compel a transfer of the stock upon the corporate books." The bill may be in the alternative for a transfer of the stock or for damages, and, if the company has already issued its whole capital stock, damages will be granted. *Birmingham Nat. Bank v. Roden*, 97 Ala. 404 (1892). Where a corporation refuses to issue the stock to a subscriber, he may file a bill in the alternative to compel the issue of the shares or the payment of their value with damages. If during the pendency of the suit the company becomes insolvent, the court can give him damages payable *pro rata* out of the assets of the corporation. *Re Reading Iron Works*, 149 Pa. St. 182 (1892). See § 61, *supra*.

³ *Smith v. North Am. Min. Co.*, 1 Nev. 423 (1865); and see § 284, *supra*.

⁴ In New York the ten-year statute of limitations runs against an equitable action against the corporation for a transfer of the certificates on its books, from the time when the outstanding certificate was issued. *Ryder v. Bushwick R. R.*, 10 N. Y. Supp. 748 (1890). In *Ware v. Galveston City Co.*, 146 U. S. 102 (1892), the bill of a claimant of stock against the company to hold it liable for allowing a transfer of the stock in fraud of his rights was barred by laches, the suit having been brought thirty-five years after the cause of action had accrued. The holders of full-paid stock cannot be assessed on such stock even under a reorganization agreement of the majority of the stockholders. Where, however, for four

§ 392. *Remedy by an action for damages.*—An action at law for damages is an old and well-established remedy of a stockholder who has applied to the corporation for a registry of a transfer and has been refused.¹ The form of the action is not definitely fixed, and in different states different forms seem to have been passed upon without any question being raised as to their technical nature.² Conversion lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company, and the common-law action of trover is a proper remedy.³ A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.⁴ Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.⁵ The statute of limitations runs only from the time when a demand for registry was made.⁶

and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer, but may give him damages for the value of his stock at the time of the demand of transfer, together with interest. *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52 (1893).

¹*Hussey v. Manufacturers', etc. Bank*, 27 Mass. 414 (1830); *Helm v. Swiggett*, 12 Ind. 194 (1859). Cases supporting this rule abound in all the states. They will be found together with others in ch. XXXV, *infra*. If the corporation illegally refuses to allow a registry, but afterwards does allow it, the corporation is not liable in damages for the decline of the market value of the stock in the meantime. *Skinner v. City of London M. Ins. Co.*, L. R. 14 Q. B. D. 882 (1885). Even in England, if the company has completed a transfer upon its books and then repudiates the transfer on the ground that it had prior to that time transferred the same stock to others, the company is liable in damages to the party to

whom the last transfer was made. *Tomkinson v. Balkis Consol. Co.*, [1891] 2 Q. B. 614. A corporation is liable in damages for refusing to allow a transfer of the stock where such refusal is unjustifiable. *Doty v. First Nat. Bank of Larimore*, 3 N. Dak. 9 (1892). If the company illegally refuses to transfer stock it is a conversion. *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50 (1891). The appropriate remedy of a purchaser to compel a corporation to register a transfer to himself is an action on the case, wherein the measure of damages is the value at the time of refusal to transfer. See § 573, *infra*.

²See ch. XXXV, *infra*.

³*Ralston v. Bank of California*, 112 Cal. 208 (1896).

⁴*McLean v. Charles, etc. Co.*, 96 Mich. 479 (1893). On this subject, see ch. XXXV, *infra*.

⁵*Carpenter v. American, etc. Assoc.*, 54 Minn. 403 (1893).

⁶*Cleveland, etc. R. R. v. Robbins*, 35 Ohio St. 483 (1880); *Iron R. R. v. Fink*, 41 Ohio St. 321 (1884).

CHAPTER XXIII.

RULES FOR CORPORATIONS IN REGARD TO REFUSING OR ALLOWING REGISTRIES OF TRANSFERS OF STOCK.

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| <p>§ 393. Purpose of the chapter.</p> <p>394. Right to refuse until the transferrer pays the unpaid subscription price.</p> <p>395. Whether the corporation may refuse to register a transfer to an irresponsible transferee.</p> <p>396. Corporation may refuse to register as transferees persons who are incompetent to contract.</p> <p>397. Trustees, executors, guardians, agents, and pledgees.</p> <p>398. Sales of stock by executors or administrators.</p> <p>399. Sales by trustees.</p> <p>400. Sales by guardians.</p> <p>401. Forgery of transfer.</p> | <p>§ 402. Corporation must require a surrender of the outstanding certificate.</p> <p>403. Alleged loss of the old certificate.</p> <p>404. Attachment or execution.</p> <p>405. Decree of a court that certificates be issued.</p> <p>406. Theft of certificates indorsed in blank.</p> <p>407. Interpleader by the corporation.</p> <p>408. Restrictions by corporation on stockholder's right to sell or transfer.</p> <p>409. Lien of the corporation.</p> <p>410. Formalities of registry which the corporation may insist upon.</p> |
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§ 393. *Purpose of the chapter.*—It is proposed in this chapter, as a continuation of the last, and as a recapitulation of the various rights, liabilities, and duties of the corporation in refusing or allowing a registry of a transfer of stock, to state briefly the rules which prevail herein. The standpoint taken is that of the corporation. The minute and particular application of the general rules governing this subject are not stated here at length; but an effort has been made to give, in systematic order, certain directions which will enable a corporation, when in doubt as to whether to allow or refuse a registry, to decide the question intelligently and safely.

§ 394. *Right to refuse until the transferrer pays the unpaid subscription price.*¹—A corporation cannot refuse to register a transfer of stock merely because the subscription price has not been fully paid in, unless the charter or the statutes of the state expressly give that right. Nor can it refuse registry, even though a call for part of the subscription price has been made, is due, and remains unpaid. It must allow a registry, but may

¹ See ch. XV, *supra*.

continue to hold the transferrer liable for the call. The corporation has no lien on the stock for the subscription price, nor has it a right to restrict transfers until calls or parts of the subscription price not yet called are paid. The policy of the law is to favor the right of transfer, and no impediments by the corporation are allowed to restrict that right. As regards parts of the subscription not yet called in, the transferrer is released from and the transferee assumes the liability. As regards calls made before the application for registry, but not yet due, the transferrer is liable, but, it seems, not the transferee. As regards calls made before the application and due before such, the transferrer and not the transferee is liable. As regards calls made after the application the transferee alone is liable. In Pennsylvania, however, a different rule prevails, and by statute the transferrer, if he is the original subscriber, is liable until the whole subscription is paid. In New York, by statute, both railroad and manufacturing corporations may refuse to allow registry of transfers until unpaid calls have been paid.

§ 395. *Whether the corporation may refuse to register a transfer to an irresponsible transferee.*¹—Greater difficulty is experienced in finding a working rule on this subject. On one point, however, all the authorities agree. If the corporation is insolvent, or in such a state of decline that insolvency seems inevitable, the corporation may refuse to allow a registry of transfer from a responsible to an irresponsible insolvent transferee. The policy of the law is to protect corporate creditors, even at the expense of restricting the right of transfer. The above rule applies not only where the subscription is unpaid, but also where it has been paid and only a statutory liability exists. Where, however, the corporation is solvent, and a stockholder applies for a registry of transfer from himself to an irresponsible transferee, it seems that the corporation cannot refuse to make the registry.

§ 396. *Corporation may refuse to register as transferees persons who are incompetent to contract.*²—If the transferee of a certificate of stock is an infant or person of unsound mind, the corporation may refuse to register such transferee as a stockholder. The reason of the rule is that such persons would not

¹ See ch. XV, *supra*.

² See ch. XIV, *supra*.

be obliged at law to respond to the obligations of a stockholder, and consequently are not entitled to its privileges. With married women at the present day the law is different. At common law they were incompetent to become stockholders, as is an infant at the present time. But the statutes of all the states have substantially removed these disabilities, and enabled a married woman to transact business as a *feme sole*, so far as her separate estate is concerned. She may become a stockholder in a corporation, but cannot bind her husband's estate for the liabilities of such stockholdership.

§ 397. *Trustees, executors, guardians, agents, pledgees.*¹—In registering transfer to a trustee, executor, or guardian, the corporation may be required to register the transferee as holder in his official capacity. A trustee who purchases or receives stock to hold in trust for the benefit of another may, it seems, require the corporation to register the transfer and issue new certificates to himself in his own name as “trustee.” In England the rule appears to be different. The reason of this rule is that the liability of a trustee on stock is in many of the states different from that of a complete owner of the stock, and also because, where stock is held by a trustee as such, it is the duty of the corporation to refuse to allow the trustee to sell and register a sale of the stock unless the instrument creating the trust authorizes such sale. So also an executor or administrator or guardian may compel the corporation to place his official title after his name in the stock registry. Pledgees, however, and agents have not this right. The corporation may, but is not obliged to, write the word “pledgee” after the transferee's name either in the stock registry or on the certificate. Such is the rule, for the reason that the corporation is not obliged to protect the rights of the pledgor, nor to recognize the pledgeeship of the transferee. The same rule applies to transferees who take as agents of the transferrer.

§ 398. *Sales of stock by executors or administrators.*²—A corporation may with safety, and in fact is obliged to, allow an executor or administrator to register a transfer of the sale of stock belonging to the estate upon presentation by the executor or administrator of the letters testamentary or letters of administration. The executor or administrator may then reg-

¹See ch. XIV, *supra*.

²See ch. XIX, *supra*.

ister a transfer of the stock to himself, or directly from the name of the deceased to a purchaser from the executor; or from the deceased to the executor, and then from the executor to the purchaser. One executor may sell and register a transfer of the stock. The corporation is not bound to inquire whether it is necessary that the sale be made in order to pay the debts of the estate, nor to see to it that the executor actually applies the proceeds of the sale to that purpose. Where, however, the corporation has actual knowledge through its officers that a breach of trust is contemplated by the executor, it is bound to refuse registry, and will be liable to the estate for neglecting so to do. So also, where such a long time has elapsed between the taking out of the letters and the sale by the executor that the latter has become practically a trustee, the corporation must use the same precaution as in sales by a trustee. In the case of specific legacies of stock, the corporation need take no notice of them, but must allow the executor to transfer the stock into his own name, since he may need it to pay debts, and the corporation is not bound to investigate such questions.

§ 399. *Sales by trustees.*¹—A trustee who holds stock belonging to the trust estate has no right to sell and transfer such stock unless he is expressly authorized so to do by the instrument creating the trust. Consequently the law imposes upon the corporation the duty of refusing to allow a trustee to transfer the stock unless he clearly has a right so to do. If the corporation neglects this duty it is liable to the trust estate, and, in case of a breach of trust by the trustee, may be compelled to replace the stock or pay damages. If the trustee has an express power given to him to sell, the corporation may allow him to make the transfer. If no such power is given, the corporation must refuse. The trustee is bound to reasonably satisfy the corporation of his right, but the corporation cannot permanently retain the papers submitted to it for that purpose.

§ 400. *Sales by guardians.*²—A guardian has a right to change the investment of the funds in his charge, and consequently has a right to sell stock held by him in his official capacity. Accordingly, the corporation may allow him to register a transfer of stock held by him as guardian, and cannot require the guardian to obtain an order or decree from a court authorizing such

¹ See ch. XIX, *supra*.

² See ch. XIX, *supra*.

transfer. An order or decree is often obtained by the guardian, however, for his own protection, and is to be commended. In New York the rights and duties of guardians are regulated by statute, and other states have similar statutes.

§ 401. *Forgery of transfer.*¹—A corporation is bound and required to detect a forgery whereby the name of the owner of a certificate of stock is signed to it and a transfer made which the corporation is requested to register. The stockholder in whose name the old certificate was made out, and whose name was forged to the transfer, may hold the corporation liable if it fails to detect the forgery and allows a registry of the forged transfer. He may compel it to replace the stock or pay damages. This rule is due to the fact that the corporation is a custodian of the books whereby a stockholder obtains his rights of stockholdership, and it cannot deprive him of these rights by allowing others to take them from him by the aid of the corporation and without his consent. It is in the power of the corporation to require the presence of the transferrer at the time of registry, or at least clear proof that the signature is genuine. The corporation, however, has recourse over against the person who applied for registry on the forged transfer, however innocent the latter may be. He is held to have impliedly represented that the transfer was genuine.

§ 402. *Corporation must require a surrender of the outstanding certificate.*²—If a corporation permits a registry of a transfer of stock, and issues new certificates to the transferrer without requiring a surrender of the old certificate, it assumes a dangerous position, and one which it is not obliged to assume. If the certificate which is not delivered up is in the hands of a *bona fide* purchaser for value and without notice, he may hold the corporation liable for allowing a registry of transfer to another without requiring a delivery of the certificates. It is negligence and a breach of duty on the part of the corporation to allow a registry without a surrender of the old certificate. It generally refuses to do so, as is its duty, and is sustained by the law in its refusal. There are occasions, however, where the law compels the corporation to register the transfer without a surrender of the old certificate. When so compelled to do, the corporation cannot be held liable by the purchaser

¹ See ch. XXI, *supra*.

² See ch. XXI, *supra*.

of the outstanding certificate, but he must seek his remedy against others. Such compulsory registry, excusing the corporation, may exist in cases of alleged loss of the old certificate, a decree of a court compelling the registry, and, under the latter, an attachment or execution against the stock.¹

§ 403. *Alleged loss of the old certificate.*²—According to the rule of nearly all the states, a corporation is not obliged to issue a new certificate of stock to the owner of an old one, which he alleges he has lost, unless such person gives to the corporation a sufficient bond of indemnity to protect it against liability in case it turns out that the old certificate was not lost, but was sold and passed into *bona fide* hands. In New York this rule is fixed by statute. The corporation is liable to the holder of the outstanding certificate, if it is outstanding, and consequently should be protected against that liability by a bond from the applicant for registry. In Louisiana a statutory advertisement is made and a bond of indemnity dispensed with. But in the other states the court compels the loser to give a bond, varying in amount according to the amount of the stock and the clearness of the proof of loss.

§ 404. *Attachment or execution.*³—Nearly all the states have laws whereby shares of stock are rendered subject to levy of attachment and to sale on levy of execution. Such attachment or execution can be levied only at the domicile of the corporation, since the certificates are mere evidences of title, and the *res* itself of the stock exists only where the corporation is created. When, therefore, an execution sale, or an attachment followed by an execution sale, takes place where the corporation exists, the purchaser at such sale generally has not the outstanding certificate, but nevertheless demands registry of himself as stockholder in accordance with the law authorizing the attachment and execution. In the meantime the judgment debtor whose stock is thus attached or sold under an execution generally has sold or will sell his certificate of stock to a *bona fide* purchaser for value. If it happens that both parties claim the stock, the duty and privilege of the corporation is plain. It may refuse to decide between them, and when sued by either may interplead and compel the claimants to settle the right be-

¹ But see § 489, *infra*.

³ See ch. XXVII, *infra*.

² See ch. XXI, *supra*.

tween them in the courts. But frequently it happens that the corporation does not know whether the judgment debtor has sold the outstanding certificate or not. By the law of most of the states, if such certificate was sold before the attachment or execution was levied, the purchaser would be protected, and the corporation would be liable to him for registering as a stockholder the purchaser at the execution sale. Accordingly, in that case, it is the duty of the corporation to refuse to register the purchaser at the execution sale. It cannot afford to take the risk, and is not obliged to take it. If the court then compels it to make the registry of transfer to the execution purchaser, the court will also, probably, compel such purchaser to give a bond of indemnity to protect the corporation. If such a bond is not required by the court, the corporation must nevertheless obey the decree. What rights the purchaser of the outstanding certificate would then have, has not as yet been passed upon by the courts.

§ 405. *Decree of a court that certificates be issued.*¹—A corporation must of course obey the decree of a court that it issue a certificate of stock to a specified person. But a court will rarely resort to such an extreme remedy where it is probable or possible that there may be an outstanding certificate in the hands of an innocent holder representing the same shares. As a principle of law the court has no power to decree such an issue ordinarily, since the whole capital stock has been issued, and its decree amounts practically to an order to make an overissue of stock. Generally the court decrees damages to be paid, or directs the corporation to purchase stock for the purpose of re-issuing it to the specified party. This occurs frequently where the corporation has unjustly deprived a person of his stock. A different class of cases arises where the corporation has refused to allow a registry because the outstanding certificate is not surrendered. Such cases include those of alleged loss of certificate, an execution sale of the stock, and, possibly, a suit in equity at the domicile of the corporation to recover from another stock which the complainant claims. A decree in such a suit in most states would be ineffectual to deprive of his rights one who purchased from the defendant his certificate of stock before the decree was rendered. It would accordingly

¹See ch. XXII, *supra*.

be a harsh decree that compelled the corporation to register the successful complainant as a stockholder. The corporation should not be compelled to assume the risk of being sued by the purchaser of the outstanding certificate. The complainant should be compelled to give a bond of indemnity, or else be contented with a personal judgment against the defendant. The demands of trade and of an investing public require that the safety of a purchaser of a certificate of stock should be assured, except against attachments, execution sales or decrees duly obtained and notified to the corporation before the *bona fide* purchaser received the certificate of stock.

§ 406. *Theft of certificates indorsed in blank.*¹—The corporation has a duty to perform as regards certificates of stock which have been stolen from the owner who held them indorsed in blank.

If the owner notified the corporation of the theft it must refuse to register a transfer to a purchaser of such stolen certificate. Since the owner's negligence may have estopped him from reclaiming the stock, the corporation may refuse to recognize either party as a stockholder, where there is a reasonable question of negligence, and when sued by either may interplead. If the corporation allowed a registry before it was notified of the theft, it is difficult to see on what principle it is to be held liable to the owner. Such a case seems not yet to have arisen. If notified of the theft before anything is learned concerning the whereabouts of the certificate, the case is to be treated the same as when the certificate is alleged to have been lost.

§ 407. *Interpleader by the corporation.*²—Whenever there are two or more conflicting claims made to stock, and demands are made on the corporation to allow registry, it is the privilege of the corporation, if there is a reasonable legal doubt as to the rights of the parties, to refuse to register either party, and, when sued by one, to interplead and compel the parties to contest the matter between themselves in the courts. The law does not oblige the corporation to turn itself into a court of justice and decide the rights of the parties. The corporation, however, cannot interplead if it has already committed itself by registering one of the claimants as the stockholder. Nor

¹ See ch. XXI, *supra*.

² See ch. XXII, *supra*.

can the corporation resort to an interpleader where one of the claimants is clearly wrong. The right of interpleader and the power of the corporation to refuse to register a transfer until compelled to do so by the courts, where an outstanding certificate is not surrendered, constitute the two most effective safeguards of the corporation in allowing or refusing registry.

§ 408. *Restrictions by corporation on stockholder's right to sell or transfer.*¹—The law has uniformly and decisively discountenanced and overruled all attempts of a corporation to prevent the sale and transfer of its stock by the stockholder. Such attempted restrictions are generally made by means of by-laws. Thus, a by-law requiring the consent of the directors or other corporate officers to a transfer, or a by-law requiring the stockholder, when he sells, to sell his stock to specified persons, is null and void. Restrictions may be created by a contract mutually agreed to by the stockholders, but cannot be imposed upon them by the majority of the stockholders nor by the board of directors. When, however, such restrictions are created by the charter, they are valid, since they arise with the corporation and stock itself. Thus, in England, the charter frequently authorizes the directors to refuse a registry unless the transferee is satisfactory to them. Even here, however, the directors must be reasonable in the use of their discretion. In this country the most frequent restriction created by charter is that of a lien for debts due to the corporation from the transferrer.

§ 409. *Lien of the corporation.*²—The charters of many corporations contain an express provision that the corporation may refuse to allow a stockholder to register a transfer of his stock until he has paid any and all debts which he may at that time owe to the corporation. Such a lien need not be stated in the certificate of stock. While it may not be created generally by a by-law, yet certain phrases in charters have been held to uphold a lien that is declared and made effectual by a by-law. Where the lien exists the corporation may refuse to allow a registry of transfer of any stock owned by the debtor until all debts due from him to the corporation are paid, whether due or not due, including, it seems, unpaid subscriptions. It does not apply, however, to debts due from a transferee of the cer-

¹ See ch. XXXVII, *infra*.

² See ch. XXXI, *infra*.

tificate who never obtained registry or appeared as a stockholder on the corporate books. Nor does it apply to debts due from the registered stockholder, but incurred after the corporation was given notice that he had sold his stock to another. The corporation may waive its lien and allow registry without the debts of the old stockholder being paid. A registry without requiring payment is a waiver in itself.

§ 410. *Formalities of registry which the corporation may insist upon.*¹—Where, as is ordinarily the case, the owner of stock has sold it by signing the transfer and power of attorney on the back of the certificate, leaving the names of the transferee and of the attorney blank, the corporation may require the names of the transferee and of the attorney to be filled in before it allows a registry. If it is in doubt as to the genuineness of the signature of the former owner of the certificate, it may require his presence or reasonable proof that he actually made the signature. It cannot compel the transferrer to be present, but may require the presence of the attorney authorized to make the registry. The registry itself is generally made by the corporate officer, but he may require the attorney to make it. A surrender of the old certificate is required, and new certificates in the name of the transferee are issued. The by-laws may prescribe that the registry shall be in the presence of certain corporate officers. A mere request to register is not registry, although the old certificate is left with the clerk, together with the transfer, and he marks “received for record” on the same. If the corporation does not keep a transfer book or stock book, a surrender of the old certificate and the issue of a new one is sufficient to constitute a transfer and registry. The applicant may inquire of the corporate officer in charge for the registry clerk, and is not bound to ascertain the individual himself. Registry at a branch office may not be a legal registry until entered at the main office. The corporate registry may be on its ledger without any issue of certificate. If it keeps no registry at all, mere notice to it of a transfer constitutes a legal registry. The corporation has no right to delay registry unreasonably for the purpose of obtaining advice or for any other reasons. It may require that the power of attorney run directly from the former registered stockholder and not from an intermediate one. A

¹See ch. XXII, *supra*.

written acceptance of the stock by the transferee cannot be insisted on by the corporation. The formalities of registry may be waived by the corporation, and any act which indicates that it considers a transferee to be a stockholder is effectual to make him such so far as the corporation is concerned, though no registry was had.

Either the transferrer or the transferee or an intermediate unregistered transferee may apply to the corporation for the purpose of obtaining a registry. The corporation cannot refuse it merely because of the motive of the transferrer or of the transferee in making the sale and transfer. Whenever the corporation refuses to allow a registry the applicant may sue it for damages, or he may go into a court of equity and ask that the corporation be decreed to allow registry or to pay damages in lieu thereof. A few cases hold that he may compel registry by a mandamus against the corporation, but the weight of authority holds otherwise.

CHAPTER XXIV.

NON-NEGOTIABILITY OF STOCK AND DANGERS INCURRED IN THE PURCHASE OF CERTIFICATES OF STOCK.

A. NON-NEGOTIABILITY.

- § 411. Nature and kinds of negotiable instruments.
412. Certificates of stock are not negotiable instruments, but have been given many of the elements of negotiability in America — In England they are not negotiable in any sense.
413. The term "quasi-negotiability," as applied to certificates of stock, throws little light upon the subject.
414. The distinction between the "legal" and the "equitable" title in the transfer of certificates of stock is unsatisfactory.
415. The only method of treatment of the subject seems to be by inquiring under what facts the holder or purchaser is protected.
416. The particular rules protecting a *bona fide* purchaser of certificates of stock are based on estoppel.

B. DANGERS INCURRED IN PURCHASING STOCK.

417. Liabilities, risks, and rights of one who owns or purchases a certificate of stock.
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420. Statutory liability.
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- § 423. Liability when stock was issued for property.
424. Liability as partners by reason of defective incorporation or for other reasons.
425. Danger of corporate lien.
426. Over-issued stock.
427. Danger that transferrer or previous holder is an infant, married woman, or lunatic.
428. Purchase of stock by or from a corporation.
429. Purchase from joint owners, partners, and agents.
430. Purchase of stock at sheriff's execution sale, or from assignee in bankruptcy, or for benefit of creditors.
431. Purchase from a pledgee.
432. Pledgee is protected in the same way as purchaser of stock.
433. Danger of purchasing from an executor, administrator, or guardian.
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435. Sale by vendor to another purchaser without delivery of certificates of stock.
436. Danger of forgery.
437. Loss or theft of certificates indorsed in blank.
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439. Statute of frauds.
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441. Method of assigning a certificate of stock.
442. Registry of transfer.
443. Purchaser not affected by rights of holders of that stock back of the last registry.
444. Summary.

A. NON-NEGOTIABILITY.

§ 411. *Nature and kinds of negotiable instruments.*—Negotiable instruments at the present day are promissory notes,

bills of exchange, checks, bank-notes, bonds of the United States, of states, of foreign governments, of cities and counties and municipalities generally, certificates of deposit, interest coupons, and bonds of corporations.¹ Bills of lading have only a quasi-negotiability.² These different instruments, however, are not necessarily negotiable, but are so only when in writing; when containing an unconditional promise or order to pay; when the payment is to be in money only; when the amount is certain; when it is payable to a specific person, and not in the alternative; when it is payable at a certain time; when it contains words such as "to A. or order," or "to bearer," or their equivalent; and when delivery has been duly made. If the instrument is lacking in any one of these qualities, it falls back into the category of non-negotiable — that is, merely assignable — instruments. Again, a holder of one of the above-named negotiable instruments can have the benefit of its negotiability only when he has purchased it in good faith, for value, before the instrument was due, and without notice of the equitable rights of previous holders or makers; that is, he must be a *bona fide* holder.³ When all these elements of negotiability and ownership co-exist, the advantage of negotiability over non-negotiability is this: that the holder of the instrument is entitled to the face value thereof, and his right cannot be affected, decreased, or defeated by any facts or equities between previous holders which would defeat the security as between them, unless it be void for usury or other similar cause.

§ 412. *Certificates of stock are not negotiable instruments, but have been given many of the elements of negotiability in America — In England they are not negotiable in any sense.* — It is very clear, and it is well established, that certificates of stock are not negotiable instruments.⁴ A certificate of stock

¹ Daniel, Neg. Inst., 3d ed., book VI; Dos Passos on Stock Brokers, ch. IX. As to bonds of corporations, see ch. XLVI, *infra*.

² Pollard v. Reardon, 65 Fed. Rep. 848 (1895). See also Bank of Batavia v. New York, etc. R. R., 33 Hun, 589 (1884).

³ As to who is a *bona fide* holder, see § 767, *infra*.

⁴ Certificates of stock are not nego-

tiable. Hammond v. Hastings, 134 U. S. 401 (1890). "Certificates of stock are not securities for money in any sense; much less are they negotiable securities." Mechanics' Bank v. New York, etc. R. R., 13 N. Y. 599, 627 (1856); Barstow v. Savage Min. Co., 64 Cal. 388 (1883); Clark v. American Coal Co., 86 Iowa, 436 (1892). Weaver v. Barden, 49 N. Y. 286, 288 (1872), says that a certificate of stock

is not a promise or order to pay money, nor has it any of the essentials of a negotiable instrument. Moreover, it has been repeatedly decided by the courts that a certificate of stock is not negotiable, and no custom of trade or of brokers can give to it that character. Nevertheless the New York court of appeals has well said that while certificates of stock are not

has none of the qualities of commercial or negotiable paper. *Leitch v. Wells*, 48 N. Y. 585, 613 (1872), says: "Since the decision of the case of *McNeil v. Tenth Nat. Bank*, . . . certificates of stock, with blank assignments, and powers of attorney attached, must be nearly as negotiable as commercial paper." *Weyer v. Second Nat. Bank*, 57 Ind. 198, 208 (1877), says: "The difference between a promissory note and a certificate of bank stock is so wide and marked that a rule of law governing the transfer of the former is by no means applicable to the latter." *Sewall v. Boston Water-power Co.*, 86 Mass. 277 (1862), says: "The authorities cited show that a certificate of stock is not a negotiable instrument, and without any authorities it is apparent that it has not a negotiable character." To same effect, *Mandlebaum v. North Am. Min. Co.*, 4 Mich. 465, 473 (1857), holding, however, that by statute in that state certificates of stock are practically negotiable. *Shaw v. Spencer*, 100 Mass. 382 (1868), says: "It is clear that a certificate of stock transferred in blank is not a negotiable instrument. . . . No commercial usage can give to such an instrument the attributes of negotiability." *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412 (1875); *Bridgeport Bank v. New York, etc. R. R.*, 30 Conn. 231, 275 (1871), holding that "the certificate accompanied by the assignment and power of attorney thus executed in blank has, perhaps, a species of negotiability, although of a peculiar character, but one necessary to the pub-

lic convenience." In *First Nat. Bank v. Lanier*, 11 Wall. 369, 377 (1871), the court say that although certificates of stock are "neither in form or character negotiable paper, they approximate to it as nearly as practicable." *Brinkerhoff-Farris, etc. Co. v. Home Lumber Co.*, 118 Mo. 447 (1893). In a recent case in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock signed by the stockholder with the name of the transferee left blank does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. *German Sav. Bank v. Renshaw*, 28 Atl. Rep. 281 (Md., 1894), a case wherein a broker holding stock on a margin repledged it at a bank. Compare § 432, *infra*. In *Hampton, etc. R. R. v. Bank*, 26 S. E. Rep. 238 (S. C., 1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

negotiable in form and represent no debt and are not securities for money, yet "the courts of this country, in view of the extensive dealings in certificates of shares in corporate enterprises, and the interest, both of the public and of the corporation which issues them, in making them readily transferable and convertible, have given to them some of the elements of negotiability."¹

In England an entirely different rule prevails. Certificates of stock in that country are merely evidences of ownership of stock, and this muniment of title is not negotiable nor quasi-negotiable. The purchaser of it is not protected against equities involved in the title of prior owners of the certificate. Only a transfer on the corporate books shuts off those equities. Indeed, this rule is insisted upon in England so rigidly that not even the certificates of stock issued by American corporations and held by Englishmen are given the quasi-negotiability of the American law.²

¹ *Knox v. Eden Musée Co.*, 148 N. Y. 441 (1896), rev'g 74 Hun, 483.

² The English courts refuse to follow the American rule in regard to the practical negotiability of certificates of stock transferred in blank, although such certificates of stock are issued by an American corporation. Hence, where the English owner of such certificates delivered them to a broker to forward to America for a transfer, and the broker fraudulently sold them for his own purposes to other persons, it was held that no title was conveyed to such other persons, and that the American law did not apply. The court said, however, that there was sufficient in the case to put the purchasing party upon notice. *Colonial Bank v. Cady*, L. R. 15 App. Cas. 267 (1890). As between the trustee in bankruptcy of a defaulter and the party to whom the defaulter has transferred shares of stock without a transfer on the corporate books, the latter is entitled to the stock. *Re Dodds*, 64 L. T. Rep. 476 (1891). In *Moore v. Northwestern Bank*, [1891] 2 Ch. 599,

the rules of the company provided that, when certificates were sent in for transfer, the particulars should be entered in a book, which must be brought before the directors for approval and be signed by three members of the board, after which the registry of transfer was completed. The real owner of the certificates was permitted to reclaim them before approval by the directors, the court saying that the notice thus given to the company gave the court seisin for purposes of adjudication. In *Simmons v. London J. S. Bank*, [1891] 1 Ch. 270, the court held that a bank to whom a broker had pledged stocks belonging to his customer was not a *bona fide* purchaser, under the facts in that case, and consequently was not protected, even though a *bona fide* purchaser might have been. Although in England an unregistered transferee of stock is not protected against another transfer which is registered, yet he is protected where he lodged his transfer with the corporate secretary, and the latter accepted it for

§ 413. *The term "quasi-negotiability," as applied to certificates of stock, throws little light upon the subject.*¹—It is little satisfaction to the court, the practitioner, the student, or the owner of stocks to be told that certificates of stock have a quasi-negotiability. The term itself has been coined to describe the character of certain things which can be understood only by a study and knowledge of the characteristics of the thing described. Especially is this true of certificates of stock. The information sought is not whether the certificate is quasi-negotiable, but whether the holder of it is protected under different states of fact and circumstances. He who intends to purchase such certificates wishes to know what dangers or risks he incurs by the purchase. The practitioner is interested, not in the general character of the instrument, but in the law as applicable to his particular case. Many of the cases concede to certificates of stock a quasi-negotiability; but it is extremely doubtful whether such discussions do not confuse any understanding of the character of such an instrument more than they explain it.

§ 414. *The distinction between the "legal" and the "equitable" title in the transfer of certificates of stock is unsatisfactory.*—Many of the cases involving the rights of a transferee of stock discuss and treat the subject from the point of view

transfer before the second transfer was made. *Nanney v. Morgan*, L. R. 35 Ch. D. 598 (1887). In England an American certificate of stock indorsed in blank gives no more rights to a *bona fide* purchaser than to a *mala fide* purchaser. Until a registry is made, the registered owner may claim his property and set up all equities to regain possession. *Williams v. Colonial Bank*, L. R. 38 Ch. D. 388 (1888); *Dodds v. Hills*, 2 H. & M. 424 (1865); *Roots v. Williamson*, L. R. 38 Ch. D. 485 (1888). In England certificates of stock indorsed in blank convey title by estoppel to a *bona fide* purchaser when the transfer need not be by deed under seal. *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. D. 194 (1877); *Ex parte Sargent*, L. R. 17 Eq. 273

(1874). But this is generally not the case. *Ortigosa v. Brown*, 47 L. J. (Ch.) 168 (1877); *Donaldson v. Gillot*, L. R. 3 Eq. 274 (1866); and *France v. Clark*, L. R. 22 Ch. D. 830 (1883), gives no protection to the *bona fide* purchaser until he is registered. See also *Shropshire, etc. Co. v. Queen*, L. R. 7 H. L. 496 (1875); *Briggs v. Massey*, 42 L. T. 49 (1880). See also §§ 325, 351, 359, 377, 380, *supra*.

¹ Daniel, *Neg. Insts.*, § 1708, says: "The phrase 'quasi-negotiable' has been termed an unhappy one, and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other short-hand expression the nature of those instruments which, while not negotiable in the sense of the law merchant,

that the transferee is protected in his ownership when the legal title passes to him, but is not so protected when only the equitable title passes. Unfortunately it happens that, under the same state of facts, one court will hold that only the equitable title passes; another that the legal title passes; and a third court will hold that both the legal and the equitable titles pass. The result is confusion, doubt, and difficulty, with little light as to the real status of certificates of stock.¹

are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable."

¹Such also seems to be the view taken in *Lowell on Transfer of Stock* (1884), pp. 104, 105, where the learned authors say: "It is often supposed, for example, that the right of a creditor to seize stock which has been sold before it is transferred upon the books depends upon the passing of the legal title; but we shall attempt to prove that the legal title has in reality no effect upon the matter." The same authority shows the confusion resulting from this distinction of the legal from the equitable title in the following note to page 103: "That the legal title passes before the transfer on the books. In the following cases this is made part of the *ratio decidendi*: *Ross v. Southwestern R. R.*, 53 Ga. 514, 532 (1874); *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, 463 (1879); S. C., 74 Mo. 77 (1881); *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249, 252 (1880); *Scripture v. Francetown Soapstone Co.*, 50 N. H. 571 (*semble*); *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325 (1871); *Leitch v. Wells*, 48 N. Y. 585 (1872); *Smith v. American Coal Co.*, 7 Lans. 317 (1873); *Noyes v. Spaulding*, 27 Vt. 420 (1855); *Cherry v. Frost*, 7 Lea (Tenn.), 1 (1881). In the following cases the same principle was laid down *obiter*: *State v. Leete*, 16 Nev. 242, 250 (1881); *Eastman v. Fiske*, 9 N. H. 182 (1838); *New York, etc. R. R. v. Schuyler*, 34

N. Y. 30, 80 (1865); *Grymes v. Hone*, 49 N. Y. 17 (1872); *Johnson v. Underhill*, 52 N. Y. 203 (1873); *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616 (1874); *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365 (1879); and see *Purchase v. Exchange Bank*, 3 Rob. (N. Y.) 164 (1865). . . . That the legal title does not pass until transfer on the books. In the following cases this principle is made a part of the *ratio decidendi*: *Union Bank v. Laird*, 2 Wheat. 390 (1817); *Lowry v. Commercial, etc. Bank*, Taney, 310 (1848); S. C., 15 Fed. Cas. 1040; *Brown v. Adams*, 5 Biss. 181 (1870); S. C., 4 Fed. Cas. 350; *Williams v. Mechanics' Bank*, 5 Blatchf. 59 (1862); S. C., 29 Fed. Cas. 1376; *Becher v. Wells, etc. Co.*, 1 Fed. Rep. 276 (1880); *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579 (1818); *Northrop v. Newtown, etc. Turnp. Co.*, 3 Conn. 544 (1821); *Oxford Turnp. Co. v. Bunnel*, 6 Conn. 552 (1827); *Dutton v. Connecticut Bank*, 13 Conn. 493 (1840); *Vansands v. Middlesex County Bank*, 26 Conn. 144 (1857); *Coleman v. Spencer*, 5 Blackf. 197 (1839); *Helm v. Swiggett*, 12 Ind. 194 (*semble*) (1859); *Weyer v. Second Nat. Bank*, 57 Ind. 198 (1877); *Fisher v. Essex Bank*, 71 Mass. 373 (1855); *Boyd v. Rockport Steam Cotton Mills*, 73 Mass. 406 (1856); *Blanchard v. Dedham Gas Light Co.*, 78 Mass. 213 (1858); *McCourry v. Suydam*, 10 N. J. L. 245 (1828); . . . *Stebbins v. Phoenix Ins. Co.*, 3 Paige, 350 (1832); *Mechanics' Bank v. New York, etc. R. R.*, 13 N. Y. 599 (1856); *New York, etc. R. R. v.*

§ 415. *The only method of treatment of the subject seems to be by inquiring under what facts the holder or purchaser is protected.*—The court, the practitioner, the purchaser, or the holder of certificates of stock wishes to know what liability and what dangers are incurred by the purchase and ownership of a certificate of stock. It becomes important for him to ascertain whether forgery or theft; or improper registry by the corporation; or breach of trust by a trustee, executor, or agent formerly holding that particular stock; or fraud whereby a former owner was deprived of that same stock; or legal proceedings, such as attachment, execution, mandamus, and decrees of the court; or any other fact or equitable right between former owners of the stock which he purchases, can affect him, a *bona fide* purchaser for value and without notice of those rights. These questions cannot be solved or answered by any general rules or theories, since certificates of stock have a law, an origin, and a nature different from other kinds of securities. The fact that a registry of transfer is required to be made on the corporate books adds further complication to the rights of a holder. General rules derived from and applicable to other instruments or securities cannot, with any certainty, clearness, or satisfactory results, be applied to certificates of stock. They should be treated of by themselves. The future character and status of certificates of stock will be much clearer, better, and more satisfactory to the investing public if the law governing them be formed on its own basis.

§ 416. *The particular rules protecting a bona fide purchaser of certificates of stock are based on estoppel.*—Nearly all, if not all, of the rules whereby a purchaser of stock is protected against

Schuyler, 38 Barb. 534 (1860); Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 331, 335 (1869). In the following cases the same doctrine is laid down *obiter*: Black v. Zacharie, 3 How. (U. S.) 483 (1845); U. S. v. Cutts, 1 Sumn. 133 (1832); S. C., 25 Fed. Cas. 745 (this was, however, a case of government debt, not of corporate stock); Planters', etc. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585 (1879); Otis v. Gardner, 105 Ill. 436 (*semble*) (1883); and see Kellogg v. Stockwell, 75 Ill. 68 (1874); People's Bank v. Gridley, 91 Ill. 457 (1879); Bruce v. Smith, 44 Ind. 1 (1873); State v. First Nat. Bank, 89 Ind. 302 (1883); Shaw v. Spencer, 100 Mass. 382 (1868); Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515 (1882); White v. Salisbury, 33 Mo. 150 (1862); Boatmen's Ins. Co. v. Able, 48 Mo. 136 (1871); . . . Conant v. Seneca County Bank, 1 Ohio St. 298 (1853); U. S. v. Vaughan, 3 Binn. (Pa.) 394 (*semble*) (1811); Bank of Commerce's Appeal, 73 Pa. St. 59 (1873); Fraser v. Charles-

the rights of previous holders grow out of the fact that such previous holder or holders have enabled persons to sell the stock, and consequently are estopped from claiming that they did not intend so to do.¹ This law of estoppel protects the purchaser against not only the rights of previous holders, but against the claims of the corporation itself.² Indeed, to such an extent has the law of estoppel been applied to protect a *bona fide* purchaser of stock, that, excepting in cases of certificates transferred in blank and lost or stolen without negligence on the part of the owner, a *bona fide* purchaser is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument.³ The courts are steadily extending the application of the law of estoppel herein, and in the course of time it is possible that certificates of stock may become more negotiable than negotiable instruments themselves.

B. DANGERS INCURRED IN PURCHASING STOCK.

§ 417. *Liabilities, risks, and rights of one who owns or purchases a certificate of stock.*—It is proposed to state separately and in detail the liabilities on the subscription price and by statute incurred by one who owns or purchases a certificate of

ton, 11 S. C. 486 (*semble*) (1878).” As to the reason for the distinction between the legal and equitable title, see 1 University Law Rev. 218 (1894).

¹ Wood’s Appeal, 92 Pa. St. 379, 390 (1880); McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 329 (1871); Weaver v. Barden, 49 N. Y. 286, 288 (1872); Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 47 (1873); Mount Holly, etc. Co. v. Ferree, 17 N. J. Eq. 117 (1864); Walker v. Detroit Transit R’y, 47 Mich. 338, 347 (1882). See also Fatman v. Lobach, 1 Duer, 354 (1852); Moodie v. Seventh Nat. Bank, 3 W. N. Cas. 118 (1876); Matthews v. Massachusetts Nat. Bank, Holmes, 396 (1884); S. C., 16 Fed. Cas. 1113. The agreement of a stockholder to surrender his stock in liquidation of an unpaid assessment is without consideration, and does not bind a

purchaser of the certificate. Hill v. Atoka, etc. Co., 21 S. W. Rep. 508 (Mo., 1893). Other phases of this case are passed on in 124 Mo. 153.

² Many instances of the liability of the corporation on certificates of stock which it has issued, and which have been sold or pledged to an innocent person for value, are given in chs. XVII, XIX, XXI, XXII, XXIII, *supra*, and ch. XXVI, *infra*. The purchaser, however, is not *bona fide*, unless he actually parted with the consideration before he knew of defects as to the stock. See § 768, *infra*, as to *bona fides*, and Hayden v. Charter Oak, etc. Park, 63 Conn. 9 (1893).

³ Quoted and approved in Cincinnati, etc. R’y v. Citizens’ Nat. Bank, 47 N. E. Rep. 249 (Ohio, 1897).

stock; also the risks or dangers incurred by a purchase of stock as affected by the rights of previous holders of that stock; also a few of the rights of an owner or purchaser of a certificate of stock as regards the general incidents appertaining to stockholdership. These subjects are discussed in full in other parts of this work, and consequently the authority for rules laid down herein must be sought for in those parts. The purpose here is to state succinctly and in language free from technical phraseology the position occupied by a *bona fide* purchaser of a certificate of stock.

§ 418. *Liability on unpaid par value, that is, the unpaid subscription price of the stock.*¹—In general the purchaser of a certificate of stock is immediately liable on the subscription price of the stock so far as it has not been paid by previous holders of the stock purchased and has not been called by the corporation. The transferrer is bound to pay all calls made before the transferee purchases. If the transferee does not immediately register his transfer on the corporate books, he is liable to pay to the transferrer such calls as are made after the transfer and which the corporation compels the latter to pay. The transferee who buys supposing the stock to be full paid is not liable for uncalled and unpaid parts of the subscription, even though the certificate is silent as to whether the par value of the stock has been paid in or not. Especially is this the rule where the certificate states that the stock is paid-up stock, or the transferee, before purchasing, inquires of the corporation and is told that the stock is paid up. He may purchase in reliance thereon, and cannot afterwards be held liable, even though the stock turns out not to have been fully paid up.

§ 419. *Forfeiture for non-payment of calls.*²—Where the corporation is given by its charter or by statute the right to forfeit and sell stock for non-payment of the subscription price when called in by the corporation, a notice to the stockholder of the intended forfeiture is always required. This notice, however, is given always to him who appears by the corporate registry to be the stockholder. Accordingly, a transferee or owner of stock who has not obtained a registry of his transfer on the corporate books is liable to lose his stock by a forfeiture for non-payment of calls, and may lose it without knowledge of the

¹See ch. XV, *supra*.

²See ch. VIII, *supra*.

call or forfeiture, unless he appears on the registry of the corporation as the owner of the stock.

§ 420. *Statutory liability.*¹—The liability by statute of a purchaser of certificates of stock to corporate creditors, in addition to the subscription price which is treated of above, exists in a great many cases. In the first place this liability may not exist at all against any one, either transferrer or transferee. It rarely exists in the case of railroad corporations. Where the statutory liability exists, the liability of a purchaser of stock is as follows: If the transferee immediately registers his transfer on the corporate books, he becomes at once liable by statute for debts of the corporation contracted after such registry, and the transferrer is not liable thereon. The transferee may or may not be liable on corporate debts contracted before he purchased, according to the words of the statute creating the liability. The transferrer is liable on corporate debts contracted after he sold the stock but before the transfer was registered. In the latter case the transferrer has recourse to the transferee.

§ 421. *Liability where the purchaser has the transfer made to a nominal holder.*²—Where a person purchases stock and takes it in the name of a “dummy,” the stock never having been registered in the name of the real owner, the latter is not liable on such stock, according to the English rule. In America a contrary rule prevails, and the courts hold him liable on the ground that he is a principal, and as such is liable as an undisclosed principal for the acts of his agent, the “dummy.”

§ 422. *No liability for assessments after the par value of the stock has been paid in.*³—By well-established principles of law stockholders are liable on their stock only to the extent of the unpaid par value of the stock, unless the statute expressly provides otherwise. Neither the directors, nor all the other stockholders combined, in corporate meeting assembled or otherwise, can compel a dissenting stockholder to pay any more money into the corporation or subject him to further liability on his stock. Nor can the legislature, subsequently to his purchase of the stock, pass a law increasing his liability, unless the power to alter or amend the charter is reserved to it, in which case such a law would be constitutional.

¹ See ch. XII, *supra*.

³ See ch. XIII, *supra*.

² See §§ 253, 265, *supra*.

§ 423. *Liability when stock was issued for property.*¹—Shares of stock may be issued under an agreement that payment is to be made in labor, services, material, or contract work. If so issued, and the labor or material received by the corporation is fairly equal in value to the par value of the stock, the transferee of such stock takes it as full-paid stock, and cannot be held liable for any further amount, even though the value of the property turns out subsequently to have been overestimated, but was made in good faith. Where, however, the property is intentionally overvalued and stock is issued for it, the persons originally receiving the stock are liable to have the transaction set aside, the value of the property or work done credited to them, and the real value of the stock, not necessarily the par value, charged to them, or be compelled to return the stock. As to transferees the case may be different. If they purchased with notice of the fraud they are not protected; but if they purchased without notice or knowledge that the property was intentionally overvalued, but supposed that the stock was issued as paid up by payment in property or work taken at a *bona fide* value, or if they have no knowledge of how the stock was paid, but take it as paid-up stock, they may retain the stock, and are not liable for any further amount thereon.

§ 424. *Liability as partners by reason of defective incorporation or for other reasons.*²—Where a supposed corporation has not been duly incorporated, or where a corporation for that business is not provided for, the supposed corporation has been held to be but a partnership, and all the stockholders held liable as partners. But a failure to file the articles of association, or to sign and publish them, or the omission from them of any of the essential facts required to be stated, does not ordinarily defeat the attempted incorporation and render the stockholders liable as partners. Again, the stockholders are, in some jurisdictions, liable to be held to be partners, as regards creditors of the enterprise, where the corporation organizes in one place and proceeds to do all its business in another place. In most cases, however, the corporation has been recognized and upheld, and the stockholders protected in their limited liability. The latter class of decisions is the stronger, and certainly more to be commended and followed. In any case a transferee is not

¹ See chs. II and III, *supra*.

² See ch. XIII, *supra*.

liable for all precedent debts of the concern, but only for those incurred subsequently to the registry of his transfer.

§ 425. *Danger of corporate lien.*¹—Frequently corporations are given by charter or statute a lien on a stockholder's stock for debts due from him to the corporation. When such lien exists, a purchaser of the certificate in open market buys subject to the risk that the one from whom he buys owes the corporation a debt, and that the corporation will not allow the transferee of the certificate to obtain a registry until such debt is paid. In many of the states the lien of the corporation cannot be created by by-law. Generally it exists by reason of a provision of the charter. When it does legally exist it extends to all debts owed by the last registered stockholder, whether the debt be due or not due, and includes uncalled parts of the subscription price of the stock. It does not, however, apply to debts due from one who has bought and sold the certificate without appearing on the registry as a stockholder. The corporation may waive the lien, and a registry without insisting on the lien is such a waiver. The lien of the corporation extends to debts incurred by the transferrer after the transfer, but before the corporation is notified thereof.

§ 426. *Overissued stock.*²—The capital stock of a corporation is fixed by statute. There is no power in the corporation itself to increase that amount. It can be done only by a legislative enactment. Accordingly, if the corporation issues certificates of stock when the whole capital stock has already been issued, the new issue, if an equivalent amount of outstanding certificates is not surrendered, is an overissue, and is void. Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. The purchaser of such certificates, however, is not without his remedy. His certificate is so much waste paper, and he is not a stockholder; but he may sue the corporation for damages, and recover to the extent of his injury. The purchaser may also sue the corporate officers who participated in the issue of the spurious stock, and may recover damages. He cannot, however, hold an innocent transferrer liable. The latter, if he knew nothing of the overissue, is not to be held as a guarantor of the validity of the stock which he sells.

¹ See ch. XXXI, *infra*.

² See ch. XVII, *supra*.

§ 427. *Danger that transferrer or previous holder is an infant, married woman, or lunatic.*¹—A purchase of stock from an infant is a dangerous investment. When the infant comes of age he may elect to disaffirm, and may hold the transferee liable for the stock. There is less danger, however, in accepting a transfer of stock from an infant who has previously purchased the stock which he sells. This previous purchase, and also his sale of the stock, are technically voidable acts; but after the stock has passed from his control the law disregards the doubtful medium of title, and considers the purchaser from the infant as the legal stockholder. As regards married women, the common law allowed the husband to sell her stock after he had reduced it to possession by registering it in his own name on the corporate books. In modern times, however, the right of a married woman to hold and convey personal property as though unmarried has been established in most states by statute. Her right to sell shares of stock owned by herself exists where she may sell other personal property similarly owned, and this right depends upon the law and statutes of her domicile. A purchase of stock from a lunatic is void.

§ 428. *Purchase of stock by or from a corporation.*²—In England a corporation cannot purchase shares of its own capital stock. In this country there is a difference of opinion as to the law. The statutes governing the corporation, however, sometimes prohibit such purchases. Such is the case with national banks. In any case, however, whether the corporation purchased the stock legally or illegally, a purchaser of the same stock from the corporation itself is not affected by the invalidity of the title of the corporation. Again, it is a general rule, both in England and America, that one corporation has no right to purchase stock in another corporation. Sometimes the statutes allow such purchases, but more often expressly provide to the contrary by prohibiting them. Nevertheless, whatever rule applies to a purchase by a corporation of stock in another corporation, the law is very clear that a purchaser of such stock from the corporation is protected in his purchase. The unauthorized act of the corporation in purchasing has no effect upon the legality of its sale of the stock.

¹ See §§ 66, 67, 250, 308, 310, 318, 319, ² See ch. XIX, *supra*.
supra.

§ 429. *Purchase from joint owners, partners, and agents.*¹—One joint owner cannot sell stock standing in the name of two or more as joint owners. One partner may sell and convey stock standing in the partnership name. As regards purchases of stock from agents, greater difficulty occurs. If the purchaser does not know that the vendor is selling as an agent, but supposes he is buying stock owned by the person with whom he is dealing, the purchaser is always protected. The same rule, after considerable doubt and discussion, has been established, even though the purchaser knows that the agent is selling as agent. The sale is valid, and the purchaser is protected, provided he has no reason to suspect that the agent is selling in fraud of the owner's rights or in contradiction of his orders.

§ 430. *Purchase of stock at sheriff's execution sale, or from assignee in bankruptcy, or for benefit of creditors.*²—A purchase of stock at an execution sale by the sheriff is a dangerous investment. Almost always the judgment debtor has already sold and transferred his certificates of stock to a *bona fide* purchaser. If such *bona fide* purchaser has registered the transfer on the corporate books before the attachment or execution is levied, the purchaser at the execution sale gets nothing. If no such registry has been made, but the judgment debtor sold and transferred the certificate before the levy of attachment or execution, in most of the states, including New York, such a purchaser takes title and the execution purchaser none. In Connecticut and a few other states a contrary rule prevails. If, however, the judgment debtor sells the certificate after the attachment or execution is levied, the purchaser takes no title—the execution purchaser is entitled to the stock. A purchaser of stock from an assignee in bankruptcy or insolvency, or for the benefit of creditors, takes a good title if he obtains the certificates of stock. If, however, the insolvent has sold such certificates to another, the latter is entitled to the stock.

§ 431. *Purchase from a pledgee.*³—A pledgee of stock has no right to sell or repledge the stock held as collateral by him, unless the pledgor intended that he should do so. If, however, the pledgee sells or repledges the stock to one who takes it in good faith, for value, and without notice of the fact that he is

¹ See ch. XIX, *supra*.

² See ch. XXVII, *infra*.

³ See ch. XIX, *supra*, and ch. XXVI, *infra*.

dealing with a pledgee of the stock, such a *bona fide* purchaser is protected. He is protected absolutely, and can keep the stock if he purchased it. If, however, he merely took it in pledge from the pledgee, he is obliged to give up the stock to the real owner, where the latter tenders to the repledgee the amount of the debt owed by the pledgee to the repledgee, for which the stock was given as security. Where, however, a person buys or takes in pledge stock from one who makes known the fact that he is holding the stock as pledgee, the former is not a *bona fide* purchaser. Moreover, he is not a *bona fide* holder where he would not be a *bona fide* holder of a promissory note transferred under similar circumstances, as, for instance, where he loans the money at an usurious rate of interest; or where he knows that the person with whom he is dealing is but an agent, and is pledging his principal's stock. In all these cases, where the purchaser or pledgee of stock is not a *bona fide* holder, the real owner and original pledgor of the stock may reclaim his stock from the repledgee, or purchaser from the pledgee, where the original pledgor could recover it from the first pledgee. The repledgee or purchaser from the pledgee stands in the shoes of the first pledgee, and has no better rights than the latter.

§ 432. *Pledgee is protected in the same way as purchaser of stock.*¹—The rules contained in this chapter explain the rights, dangers, and liabilities incurred by the purchaser of stock. The same rules prevail for the most part in favor of one who receives stock in pledge. A purchaser and a pledgee are treated in the cases as being similarly protected or similarly not protected. There is, however, one important exception to this rule. If a person who is about to take stock from another knows that the latter is disposing of the stock as an agent, the former may purchase the stock and be protected, but cannot take it in pledge and be similarly protected. An agent to sell is not an agent to pledge. Another exception to the similarity of position of the vendee and pledgee of stock is that by statute, frequently, the latter is not liable on stock where the former is liable.

§ 433. *Danger of purchasing from an executor, administrator, or guardian.*²—There is practically little danger incurred

¹ See chs. XIX, *supra*, and XXVI, *infra*. ² See ch. XIX, *supra*.

in purchasing stock from any one of these. It is the duty and right of the executors or administrators to sell the personal property and convert it into money. As regards guardians, they have the right to change the funds from one investment to another, unless a statute prescribes otherwise. Accordingly, a purchaser of stock from any one of those is protected in his purchase, even though he knows that his vendor is selling in his official capacity. If, however, the vendee knows that a breach of trust is involved or contemplated, he is not a *bona fide* purchaser and is not protected. All the executors or administrators need not join in a sale of the stock owned by the estate. A sale and transfer by one is sufficient.

§ 434. *Purchase from a trustee.*¹—An entirely different rule prevails as regards stock held by a trustee as trustee. A purchaser of stock which he knows the vendor holds as belonging to a trust estate is bound to ascertain whether, by the instrument creating the trust, the trustee has a power to sell. If he has no such power, and the vendee knows that he is buying trust-estate stock, the latter is not protected, but is a party to any breach of trust that may be involved by the sale. If, however, the purchaser has no notice or knowledge that his vendor is selling trust stock, the former is a *bona fide* purchaser to that extent. He is not bound to know that the stock is trust-estate stock, and consequently he is protected in his purchase. Any facts that would put an ordinarily intelligent man on inquiry as to whether the stock belongs to a trust estate is notice, and prevents the purchaser from claiming to be a *bona fide* purchaser. Thus, such a notice is held to be given by the fact that on the face of the certificate of stock, and following the name of the stockholder, the word “trustee” or equivalent words are written. In California, however, the mere word “trustee” conveys no notice.

§ 435. *Sale by vendor to another purchaser without delivery of certificate of stock.*²—A purchaser of certificates of stock has no reason to fear that the vendor can sell the stock to another person and thereby defeat the rights of the purchaser with the certificates. If the purchaser without certificates does not obtain registry on the corporate books, he obtains nothing as against the purchaser with the certificates, even though the

¹ See ch. XIX, *supra*.

² See ch. XXI, *supra*.

latter's transaction was subsequent in time to the former. If, however, the former obtains registry on the corporate books, the corporation is at fault, and is liable to the purchaser with the certificates. The corporation must either issue new certificates to the latter or pay damages.

§ 436. *Danger of forgery.*¹—Forgery cannot be the source of a good title to any chose in action, whether a promissory note, bond and mortgage, or a certificate of stock. Consequently a purchaser of stock takes the risk that some previous owner of the stock, whose name appears on the certificate either as the registered owner or as transferee, was deprived of his title by forgery. If the forgery has been made, the purchaser cannot claim or hold the stock, although he had no actual knowledge of the forgery. He, however, has recourse to his vendor, and may compel him to repay the amount paid for the stock. Where, however, the forgery was committed prior to the last *registered* transfer of that stock, a *bona fide* purchaser from or subsequent to the last *registered* holder of that stock is protected. All rights and equities to particular shares of stock are cut off by a registry and sale of the new certificates. The party whose name was forged has recourse then only to the corporation, or to the party obtaining registry, or to previous holders. This limitation to the dangers incident to the purchase of stock extends to other rights and wrongs as well as to a case of forgery, and is of great importance in protecting a *bona fide* purchaser of stock.

§ 437. *Loss or theft of certificates indorsed in blank.*¹—It is extremely doubtful whether a purchaser of a certificate of stock which was indorsed in blank, and which has been lost by the owner and found by another who sells it, or which has been stolen by the latter, would be protected in his purchase, even though he buys in good faith. In a case of negotiable paper, such a purchaser would, of course, be protected. But probably the purchaser of the certificate of stock would not be. No case holds that he would be protected, while many hold that he would not. If the real owner was guilty of gross negligence, perhaps the purchaser from the thief or finder of the certificate indorsed in blank would be protected. In one case this question of negligence was submitted to the jury. Again, some-

¹ See ch. XXI, *supra*.

times a person sells stock without delivering the certificate, the vendor telling the vendee that the certificates have been lost. Such a title is very precarious. The purchaser should refuse to buy until new certificates are issued by the corporation to the vendor,—an issue which the corporation will make upon a suitable bond of indemnity being given to it by the person who alleges a loss. If the purchaser does not take this precaution, he buys subject to having his title defeated by another purchaser who obtained the certificates which are alleged to have been lost.

§ 438. *Danger that a previous holder has been deprived of that same stock by fraud.*¹—Shares of stock are the same as other kinds of property, in that a person who has been deprived of his stock by fraud cannot follow the stock and take it from the hands of a *bona fide* purchaser for value. The remedy of the defrauded person is for damages against the person defrauding him, or for a retransfer of the stock, if the latter still holds it, together with an injunction against the transfer of the latter. But if the person obtaining the stock by fraud sells it, even in violation of an injunction, the *bona fide* purchaser for value and without notice is protected. The defrauded party may, however, sue the person defrauding him in the state of the corporation, and, by an attachment or execution, obtain the stock if it has not passed into *bona fide* hands. Such a danger, however, is the ordinary danger of an attachment or execution. A *lis pendens* of a suit involving stock never charges the vendor of the stock with notice, as is the case of a *lis pendens* affecting real estate. Cases of fraud in the sale of stock frequently arise in cases of sales by agents and an appropriation of the proceeds; also when fraudulent representations are made to the vendor.

§ 439. *Statute of frauds.*¹—The statute of frauds requires that sales of personal property exceeding in value a certain amount, generally fifty dollars, shall be valid and enforceable only when the property is partly or wholly delivered, or partly or wholly paid for at the time of the sale, or the terms of the sale are reduced to writing. In this country a sale of stock must conform to this statute. Generally the sale is made by a delivery of the certificate indorsed in blank. Such a sale constitutes a delivery, and is legal, and is not void by the statute

¹ See ch. XX, *supra*.

of frauds. The statute applies both to sales of stock which are considered as completed and to sales which are to be completed in the future.

§ 440. *Gambling sales of stock.*¹—A gambling sale or contract to sell stock is void absolutely, and cannot be enforced. As a matter of practical experience, however, it is difficult to prove that a stock sale is a gambling sale. It is such only when both the vendor and vendee intend, not to actually have a delivery of the stock, but to wait and see whether the stock rises or falls in the market, and then to settle the contract by the loser paying the loss. An intent by one of the parties that there shall be no delivery will not make the sale a gambling one. It must be the intent of both.

§ 441. *Method of assigning a certificate of stock.*²—A certificate of stock is generally assigned by the owners signing the blank transfer and power of attorney on the back of the certificate. The transfer gives title to him whose name is afterwards filled into the blank transfer thus signed. The blank power of attorney is for an entirely different purpose. It enables the person whose name is filled in to register the transferee as a stockholder in the corporate books. Generally the power of attorney is filled in with the name of a clerk or agent of the transferee, or a clerk of the corporation who has charge of the registry books. After the registered holder has signed the transfer, leaving the transferee's name in blank, the certificate passes from hand to hand until some holder cares to fill his name into the blank. He may then obtain registry, or he may execute another transfer and sell the certificate. Transfers need not be under seal in this country. In England, by statute, they generally are required so to be.

§ 442. *Registry of transfer.*²—A registry of transfer is made by surrendering an old certificate of stock to the corporation, making an entry of the transfer on the corporate registry, and taking from the corporation a new certificate issued in the name of the transferee. The entry is generally made by a corporate officer, but he may insist on its being made by the person applying for transfer. The object of obtaining the registry is to obtain a right to vote, to receive dividends, and various other incidental stockholders' rights; also to cut off corporate liens

See ch. XX, *supra*.

²See ch. XXII, *supra*.

and the rights of third parties who may attach or claim the stock. If there is a reasonable legal doubt as to the right of the applicant to obtain registry, the corporation may refuse it, and thus obtain the protection of being compelled to make it by legal proceedings. If two parties claim the stock, each denying the right of the other, the corporation may interplead, provided there is a reasonable legal doubt as to who is entitled to the stock. If the corporation improperly refuses to register a transfer when requested, the applicant may have his remedy in damages, but in most states cannot have a mandamus.

§ 443. *Purchaser not affected by rights of holders of that stock back of the last registry.*¹—This rule is peculiar to stock certificates, and cuts off rights even of a former owner who has been deprived of the stock by forgery. In this respect certificates of stock are more negotiable than negotiable paper itself. The person who obtains registry first, after the illegal act has been done, is not protected by this rule. But his *bona fide* purchaser of the new certificates and all subsequent purchasers are protected, and cannot be compelled to give up the stock to the prior owner who was deprived of it illegally.

§ 444. *Summary.*—It will be seen, by a review of the sections of this chapter, that the dangers of loss incurred by the purchase of a certificate of stock are not serious or numerous; and it is well that such is the result. Perhaps the most striking industrial feature of modern times is the accumulation of personal property, and the investment of that property, not in landed estates, but in the stocks and bonds of corporations. Such investments are made, not alone by capitalists, but by thousands whose savings have no other satisfactory mode of disposition. The constant tendency of the statutes and of the decisions of the courts to protect *bona fide* purchasers of certificates of stock is to be commended and aided. Beyond all question, the surplus wealth of the future will be invested in corporate bonds and stocks. It is well, then, in these days of the formative period of the law governing stock, that the principles governing the transfer of certificates should be formed for the protection and security of an investing public, and should be against secret liens, attachments, claims, and negligence of both the corporation and third persons.

¹ See §§ 367, 369, *supra*.

